Jurisdictional Statement

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81-1829
No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KRAFT, INC.,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF CITRUS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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Questions Presented

1. May the State of Florida, consistently with the First and Fourteenth Amendments to the United States Constitution, compel a corporation to carry on its products and against its wishes a State selected message or label intended exclusively to further State advertising goals?

2. May the State of Florida, consistently with the First and Fourteenth Amendments to the United States Constitution, compel a citrus processor to identify itself with State advertising claims by requiring the processor prominently to display the word "Florida" or the "Florida Sunshine Tree" on its products when (a) the sole and stated purpose of the State's action is to promote and enhance the State's products, (b) the citrus processor has no control over or say with respect to the advertising, and (c) the citrus processor has disagreed with and may again disagree with the form or substance of the advertising claims?

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Authorities ii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions 3

Statement of the Case 3

The Questions Presented Are Substantial 12

Conclusion 24

Appendices 1a

TABLE OF AUTHORITIES

Cases: PAGE

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977) 16

American Meat Institute v. *Ball*, 520 F.Supp. 929 (W.D. Mich. 1981) 20n

Belk-James, Inc. v. *Nuzum*, 358 So.2d 174 (Fla. 1978) .. 20n

Buckley v. *Valeo*, 424 U.S. 1 (1976) 14

Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 447 U.S. 557 (1980) 22, 23

Dyson v. *Avoset Food Corp.*, 86 Misc.2d 769, 382 N.Y.S. 2d 947 (N.Y. Sup.Ct. 1976) 20n

First National Bank v. *Bellotti*, 435 U.S. 765 (1978) 16n

Grocery Manufacturers of America, Inc. v. *Department of Public Health*, 393 N.E.2d 881 (Mass. 1979) 20n

Johnson v. *Robison*, 415 U.S. 361 (1974) 14n

Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 23

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 18

National Comm'n on Egg Nutrition v. *FTC*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) 18n

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 13, 14, 20n, 23

Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429 (1978) 14n

Schad v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) 24n

PAGE

Smith v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979) 23

State ex rel. Arthur Kudner, Inc. v. *Lee*, 150 Fla. 35, 7 So.2d 110 (1942) 3

Swift & Co. v. *Walkley*, 369 F.Supp. 1198 (S.D.N.Y. 1973) 20n

United States v. *National Society of Professional Engineers*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd on other grounds*, 435 U.S. 679 (1978) 18n

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 17n

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943) 18

Wooley v. *Maynard*, 430 U.S. 705 (1977) 12, 15, 15n, 16

Federal Statute:

28 U.S.C.A. § 1257(2) (1976) 2

State Statutes and Regulations:

Florida Dep't of Citrus
Rule 20-66.03 4
Rule 20-66.04 ..... *passim*

Florida Stat. Ann.
§ 20.29(1) (West Supp. 1981) 3n
§ 120.68 (West Supp. 1974-81) 10
§ 601.02 (West Supp. 1982) 3
§ 601.04 (West 1962 and Supp. 1982) 3
§ 601.10(1) (West Supp. 1982) 2n
§ 601.10(7) (West Supp. 1982) 3
§ 601.15(2) (West Supp. 1982) 4
§ 601.99 (West 1962) 4
§ 601.9912 (West Supp. 1982) 3

PAGE

Cal. Admin. Code, tit. 17, R. 17,000 *et seq.* 19n

Ga. Code Ann. §§ 5-2901 *et seq.* (1981) 19n

Idaho Potato Commission Reg., B 9.01 ..... 21n

Iowa Code Ann. § 28.7 (West 1978 and Supp. 1981-82) .. 19n

La. Rev. Stat. Ann. §§ 3:451 to 3:458 (West 1973 and Supp. 1982) 19n

Minn. Stat. Ann. §§ 17.101, 17.102 (West 1981) 19n

Miss. Code Ann. § 69-7-251 to 69-7-275 (1972 and Supp. 1981) 19n

N.H. Rev. Stat. Ann. Ch. 429-A (Supp. 1979) 19n

N.J. Stat. Ann. § 4:10-16 to 4:10-24 (West 1973) 19n

N.M. Stat. Ann. §§ 76-20-1 *et seq.* (Supp. 1981) 19n

N.Y. Agric. and Mkts. Law §§ 156h *et seq.* (McKinney 1972) 19n

N.C. Gen. Stat. §§ 106-120 to 106-202 (1978 and Supp. 1981) 19n

R.I. Gen. Laws § 21-25-1 ..... 20n

Tenn. Code Ann. § 52-206 (Supp. 1981) 19n

Tex. Agric. Code Ann. §§ 93.001 *et seq.* (Vernon 1982) .. 19n

Vt. Stat. Ann. tit. 6, § 513 (1972) 20n

Va. Code § 3.1-868 (1973) 20n

Wash. Admin. Code
R. 16-403-135 *et seq.* 19n-20n
R. 16-403-140 .....19n-20n
R. 16-512-110 .....19n-20n

Other Authorities:

Note, *First Amendment Limitations on FTC Corrective Advertising Orders*, 66 Geo. L. J. 1472 (1978) 18n

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STATE OF FLORIDA, DEPARTMENT OF CITRUS,

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

Opinions Below

The Order of the Florida Department of Citrus adopting Florida Administrative Code Rule 20-66.04 is unreported, and is reprinted at 21a.* The decision of the District Court of Appeal, Second District, affirming the adoption of Rule 20-66.04, is reported at 371 So.2d 503 (Fla.2d Dist. Ct. App. 1979), and is reprinted at 26a. The decision of the Supreme Court of Florida affirming, with one dissent, the ruling below is reported at 406 So.2d 1079 (1981) and is set forth at 1a. The denial, with one dissent, of motions to modify and clarify the opinion of the Florida Supreme

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* References to —a are to the Appendix to this Statement.

Court and for rehearing is unreported, and is set forth at 60a.*

Jurisdiction

The subject of this appeal is the constitutionality of a Rule entitled "Florida Identification", adopted "for advertising purposes" (7a) by the Department of Citrus of the State of Florida.** The Rule, violation of which is a criminal offense, requires, as part of Florida's advertising program for Florida grapefruit products, that all processed 100% grapefruit products packed in retail containers in Florida prominently display the word "Florida" or the "Florida Sunshine Tree" certification mark surrounded by the text "A Product of the Florida Sunshine Tree." In an opinion dated June 4, 1981, the Supreme Court of Florida held the Rule constitutional against a challenge based upon, *inter alia*, the First and Fourteenth Amendments. (15a-20a) A petition for rehearing was timely filed on June 18, 1981 and was denied on January 8, 1982. A Notice of Appeal was filed on March 25, 1982; a copy of that Notice is set forth at 62a.

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* Pursuant to Supreme Court Rule 15.1(b), parties in the Supreme Court of Florida were the Coca-Cola Foods Division, Polk County, Florida, Treesweet Products Company, Winter Garden Citrus Products Corporation, Adams Packing Association, Inc., Bordo Citrus Products Corporation, and Kraft, Inc., appellants, and State of Florida, Department of Citrus, appellee.

Pursuant to Supreme Court Rule 28.1, Kraft, Inc. is wholly owned by Dart and Kraft, Inc. Active subsidiaries of Kraft, Inc. (not wholly owned by Kraft, Inc.) are Embare Industrias Alimenticias (Brazel), Butland Industries Ltd. (New Zealand), Sungold Dairies Proprietary Limited (Australia), Fanocel Benelux B.V. (Netherlands), Tinamenor, S.A. (Spain). Subsidiaries of Dart and Kraft, Inc. (not wholly owned) include Compagnie, Hobart, S.A. (France) and Phenix-Georgetown, Inc. (Delaware).

** Under Florida law, the Rule has the force of law. Fla. Stat. Ann. 601.10(1) (West Supp. 1982) (70a).

Jurisdiction of this Court to review the final judgment of the Supreme Court of Florida is conferred by 28 U.S.C. § 1257(2) (1976).

Constitutional and Statutory Provisions

Relevant portions of the First and Fourteenth Amendments to the United States Constitution and the entirety of Florida Administrative Code Rule 20-66.04 are set forth in the Appendix to this Statement at 66a.

Statement of the Case

The Florida Citrus Commission

The Florida Citrus Commission (the "Commission") was created in 1935 to take a variety of measures on behalf of the State of Florida to "protect the health and welfare and to stabilize and protect the citrus industry of the state." Fla. Stat. Ann. § 601.02 (West Supp. 1982) (67a). The Commission, renamed the Department of Citrus in 1969, is a department of the State government of Florida.* *State ex rel. Arthur Kudner, Inc.* v. *Lee*, 150 Fla. 35, 7 So.2d 110 (1942). It is authorized to adopt rules and regulations (Fla. Stat. Ann. § 601.10(7) (West 1962)), violation of which constitutes first degree misdemeanors. Fla. Stat. Ann. § 601.9912 (West Supp. 1982) (76a).

From its inception, the Commission, composed of "twelve practical citrus fruit men who are resident citizens of the state, each of whom is and has been actively engaged in growing . . . citrus fruit" and seven of whom must be "grower members . . . primarily engaged in the growing of citrus fruit" (Fla. Stat. Ann. § 601.04 (West 1962 &

* The "Citrus Commission" now refers to the twelve person board which directs the Department of Citrus. Fla. Stat. Ann. § 20.29(1) (West Supp. 1981).

Supp. 1982) (68a-70a)), was charged with responsibility for protecting and enhancing "the quality and reputation of Florida citrus fruit" in domestic and foreign markets. Consistent with its charge to protect citrus quality, the Commission has adopted rules making unlawful, *inter alia*, the misbranding of any package or wrapper containing citrus fruits. Department of Citrus Rule 20-66.03; *see also* Fla. Stat. Ann. § 601.99 (West 1962) (75a). Consistent with its charge to enhance the reputation of Florida citrus fruits, the Commission has established advertising campaigns, paid for by taxes imposed on the growers of citrus products, designed "to increase the consumption of citrus fruits . . ." Fla. Stat. Ann. § 601.15(2) (West Supp. 1982) (71a).

The Advertising Campaign

Since 1965, the Citrus Commission has spent large sums advertising Florida citrus products.* The Commission's advertising campaign has been widely characterized as "the success story of the decade" (Tr. 55). Between 1965 and 1975, without use of compulsory "Florida" or "Florida Sunshine Tree" identification, Florida's share of the grapefruit product market increased to the point that in 1976, Florida produced and sold 99% of all frozen concentrated grapefruit juice, 99% of all chilled grapefruit juice direct from fruit, and 70% of all canned single strength grapefruit juice.

In the five-year period before adoption of Rule 20-66.04, the Commission's citrus advertising included a variety of advertisements, many of which had as a "central theme" (Tr. 962, 79a) the asserted nutritional or therapeutic values of Florida citrus products. Some referred to citrus

* In 1975, the Commission spent approximately $2,000,000 advertising grapefruit products alone (Tr. 277). (References to Tr. — are to the appropriate pages of the transcript of hearings before the Citrus Commission.)

fruits as "food or medicine" (Tr. 962, 80a) or depicted patients in hospital situations. Others, directed at physicians and published in magazines targeted at the medical profession, contained textual claims urging that "if you want your patients to benefit from Vitamin C and a lot more, recommend citrus from Florida" (Tr. 963, 80a) and (under a photograph of a physician and his patient): "[i]f you're prescribing diuretics, here's why you should prescribe 100 percent pure orange juice from Florida." (Tr. 967, 82a) Still others praised "delicious potassium" and folic acid, urging the therapeutic benefits of Florida citrus products in combating edematous conditions found in pregnancy and hypertension (Tr. 963, 80a), in meeting the nutritional needs of pregnant women and those using oral contraceptives (Tr. 964, 81a) and the like.*

The Purpose of Rule 20-66.04

Rule 20-66.04 was adopted because of the Commission's expressed conclusion that there was, in effect, a possible missing link in its advertising. State advertising urged the virtues of "Florida" products, but, as many national grapefruit processors included no specific reference to Florida on their labels, the advertising was not, the Commission concluded, specifically tied to "Florida" grapefruit products in the minds of consumers.** The Commission

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* Two scrapbooks of advertisements were placed in the record before the Commission to illustrate those carried in magazines and on television during 1974-1976. A group of these advertisements is included in the Appendix at 90a. Since the hearings before the Commission concerned proposals for mandatory identification on both grapefruit and orange products, the advertisements refer to both products, as well as to citrus products generally.

** When the Commission initially considered mandatory identification in 1975, its director conceded that there was no proof, data, or evidence of any kind showing "that Florida origin motivates consumers or will motivate consumers to buy more Florida orange juice or more Florida grapefruit juice." (Tr. 348) At the request

accepted the view of citrus growers that "[t]o continue spending growers' money at the rate we are spending it for advertising and promotion and not to properly identify the product is an injustice to the grower who pays the bill." * (Tr. 418; *see* Tr. 1816, 1845, 1852-53)

The record explicitly establishes that the perceived desirability of greater connection between its advertising, Florida products, and the consumer was the Commission's sole purpose in requiring "Florida" or "Florida Sunshine Tree" labeling. The Commission in its Findings relied upon this factor alone, concluding:

> "1. That the public interest would be best served and the entire Florida grapefruit industry would benefit if processed grapefruit products of Florida origin

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of the Department of Citrus, FTL Research, a consulting firm, subsequently prepared a "Florida Identification Study" which was designed to determine whether Florida identification would motivate consumers to buy more citrus juice. (Tr. 1807; Canners Association Exhibit No. 38) The study found that "*at best*, no behavioral change would take place. Consumers do not seem to be reading labels now for source ID [identification], and for the most part are not even aware that the ID *is not* there. Further when the source ID *does* enter perception, it leaves them unmoved." (31) (emphasis in original) The study also found that "at worst, in markets far from Florida, fears of lack of freshness might be awakened for some. . . ." (*Ibid.*) The study concluded that "source imagery, however positive, seems to be playing no real role in purchase decision, and . . . and we see no rationale for the institution of an ID program." (*Ibid.*) After finding that there was no rationale for institution of a mandatory program, the study suggested that it is "possible" that a labeling program, utilizing only the "Sunshine Tree", could help promote frozen concentrate and chilled types (but not canned single strength) grapefruit juice. (51-52) This "possibility", however, remained untested.

* In its Findings of Fact, the Commission determined that "Florida grapefruit growers, whose excise tax revenues finance the industry's commodity grapefruit advertising and promotional programs, have strongly expressed a need for Florida identification on processed grapefruit products." (23a)

were clearly identified on consumer containers as those products covered by the Department's commodity advertising and promotional programs.

"2. That such product identification would enable the Department of Citrus to more effectively utilize the grapefruit growers' tax funds by enabling the Department to relate its consumer commodity advertising programs to a specific product readily identifiable by the consumer in the marketplace in the face of increasing competitiveness of grapefruit products from other grapefruit producing areas.

"3. That such consumer recognition of Florida grapefruit products should increase the effectiveness of the Department's commodity advertising and promotional programs and result in a benefit to consumers, growers, handlers, and processors of Florida grapefruit products." (23a)

The purpose of the Rule was summarized by the District Court of Appeal, Second District: "Respondent has determined that in the face of increasing competition of other grapefruit-producing areas in the marketplace, identification is necessary for Respondent's advertising to be effective." (49a) The Florida Supreme Court summarized the Rule's purpose in similar fashion:

"If citrus is not identified as being of Florida origin, then the money spent encouraging consumers to buy Florida citrus will be for naught. Those consumers favorably impressed with appellee's advertising campaign will be unable to determine which citrus is from Florida, and will be just as likely to purchase grapefruit from California, Arizona, Mexico, Brazil, etc., as from this state." (6a)

Citrus Commission Proceedings

Hearings were held before the Commission for portions of 11 days (spread over two years), during which opposition on various grounds was voiced to proposals for mandatory identification. On one level, the opposition arose from conflicting perceptions as to whether such identification would, in fact, assist sales of Florida citrus products, whether established national brand names would be harmed, and the like. Growers of citrus products generally testified in favor of mandatory identification; manufacturers and packagers generally opposed it.

Beyond such significant differences as to the promotional effects of mandatory "Florida" or "Florida Sunshine Tree" labeling, there was testimony of a distinct nature concerning the claims made by Florida's advertising and the explicit desire of processors *not* to be associated with them. Dr. Jerry F. Proctor, director of nutritional research for appellant Kraft, Inc. ("Kraft")*, testified before the Commission that nutritional claims made for Florida citrus products were, according to his research, unsubstantiated; that therapeutic claims were not, in his view, accurate; and that some advertisements, addressed to physicians, effectively put Florida citrus products in the category of drugs. (Tr. 960 *et seq.*, 77a *et seq.*)** Reference was also made by Kraft and others before the lower courts to their disinclination to have the spokesperson for their products be chosen, without their consent, by the Citrus Commission.***

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* Kraft is a diversified manufacturer and processor of, *inter alia*, food products, including citrus products. It processes substantial quantities of grapefruit and other citrus products in retail containers at its plant located in Lakeland, Florida, and markets grapefruit and citrus products throughout the United States.

** Portions of Dr. Proctor's testimony are set forth at 77a.

*** At the time these proceedings were before the District Court of Appeal, the controversial political, social and sexual views of

Near the end of the hearings, in early 1976, certain packers and processors urged that the proposed "Florida" and "Florida Sunshine Tree" labeling be made non-compulsory, and that the results of a voluntary program be evaluated before initiation of any mandatory program. (Tr. 1671-72) Before this, no voluntary program had been either tried or considered. (Tr. 252) The Commission subsequently approved the establishment of a voluntary program for one year. At that time, 25.1% of all brands had some Florida identification on them. This figure included 19% of canned juices, 61% of chilled juices, and 24% of concentrates. At the end of the first year of the voluntary program, the figure had risen to 32.6% of all brands, an increase of 30% over the 1976 level. This amount included 25.5% of canned juices, an increase of 33%, 65.2% of chilled juices, and 39.5% of concentrates, an increase of approximately 65%. (Tr. 1813-14) One of the Commissioners then stated that "in my opinion [the voluntary program] hasn't worked." (Tr. 1844) None of the other 11 Commissioners commented on the voluntary program, and the Commission made no finding as to its success or failure.*

On September 20, 1977, the Commission voted, without taking further steps to seek or encourage voluntary compliance, to require mandatory "Florida" or "Florida Sunshine Tree" identification on all processed 100% grapefruit products packed in retail containers in Florida. By adopting Rule 20-66.04, Florida became the only State in the

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the Commission's spokeswoman, Anita Bryant, became a subject of national controversy. The processors had no control over the choice of Ms. Bryant, just as they had no control over the content of Florida's citrus advertisements.

* There was testimony at this point that the growers would be unwilling to agree to a needed increase in the grapefruit tax without passage of mandatory Florida labeling. (Tr. 1852-53)

nation to require food processors to accept compulsory State product identification in conjunction with State advertising efforts.* The Commission's order, setting forth Findings of Fact and Law and authorizing the adoption of Rule 20-66.04, was entered on October 25, 1977.

Decisions Below

Review of the Rule was sought in the District Court of Appeal, Second District (pursuant to Fla. Stat. Ann. § 120.68 (West Supp. 1974-81)) by the Florida Canners Association, a grapefruit processors' association, and a variety of individual members which pack substantial quantities of processed grapefruit products in retail containers in Florida. Some of those processors, including Kraft, advertise and promote their own brand names.

The district court upheld the Rule and rejected First Amendment arguments raised by Kraft.** It first ruled that the association of petitioners' brand names with inferior "Florida" grapefruit products would cause them no substantive harm. (54a) It then turned to the argument that "[p]etitioners will be compelled to carry the images associated with Respondent's advertising campaign, good

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* *See* p. 18, *infra*, for a discussion of the various state approaches to state labeling and advertising.

** The court also rejected arguments, *inter alia*, that the Department of Citrus lacked statutory authority to adopt the Rule and had failed to comply with the Florida Administrative Procedure Act, that the Florida legislature had improperly delegated legislative power to the Department of Citrus, that the Rule constituted an improper exercise of State police power, and that the Rule unconstitutionally burdened interstate commerce in violation of the commerce clause. The commerce clause argument was not pressed after the Commission conceded, and the district court stated, that the Rule applied only to processed products derived wholly from Florida grapefruit. (28a). The Florida Supreme Court did not address this question.

or bad." (55a) Stating that the Rule "relates to the content of petitioner's commercial message" (55a), but noting that "[t]he validity of regulations pertaining to the content of commercial speech has been traditionally tested on due process and commerce clause grounds, not on First Amendment guarantees . . ." (56a-57a), the court held that the speech at issue was purely commercial, and that no "compelling state interest" was required "to justify infringement" of Kraft's free expression rights. (57a) The court "engaged in the task of balancing" and concluded that Kraft's "First Amendment interests are not so great as to outweigh the public's interest . . . ." (*Ibid.*)

The Supreme Court of Florida affirmed, with one dissent. As regards the First Amendment issue, the court conceded that Florida was without power to require the expression of opinions by Kraft with which it did not agree. (16a) The court concluded, however, that the Rule did not require Kraft either to "trumpet the superiority or virtues of Florida citrus" or "to agree with or echo the content and theme of Florida's citrus advertising campaign." (*Ibid.*) Nor, the court held, was Florida requiring the dissemination of any ideological message. "Were the state requiring a message such as 'Florida is Best', 'Florida Citrus is Superior', or the like," the court acknowledged, "the *Wooley* [v. *Maynard*, 430 U.S. 705 (1977)] rationale might apply; as things stand, it does not." (18a) The court observed that Florida was compelling speech rather than restricting it, and viewed the "interference with first amendment rights [as] slight and . . . the interest served [as] great." (*Ibid.*) The court concluded that although, with certain exceptions, "an entity may not be compelled to convey a message simply because that message is in a commercial context", the acknowledged First Amendment interest here was overcome by "the public's interest in protecting and promoting Florida's citrus crop."

The Questions Presented Are Substantial

This appeal concerns the free expression rights of corporations which have chosen not to associate themselves with advertising conducted by the State of Florida. As such, it might, in one sense, be viewed as presenting questions relating to the now well-recognized commercial speech doctrine developed by this Court over the last decade. But in a real sense, the questions posed are distinct and, in some respects, more basic than those involving restrictions on corporate commercial speech. They center, instead, on whether a state may force a corporation to speak and adopt state views against its will, at least in the absence of any claim that silence would be misleading or deceptive.

There is, to be sure, commercial speech here. But the speaker is Florida, not Kraft; it is Florida's speech which Kraft, under Rule 20-66.04, is obliged to communicate, Florida's claims for its products with which Kraft is to be unwillingly associated, Florida's criminal laws which Kraft runs the risk of violating by refusing to associate itself with State claims. Florida, in effect, asserts the right to make advertising claims with which Kraft substantively disagrees, to force Kraft to associate itself with those claims and effectively to deny Kraft the choice *not* to be associated with those claims—solely in the interest of promoting and enhancing the reputation of Florida's citrus products. Whether all this may be accomplished, notwithstanding Kraft's First Amendment right "to refrain from speaking at all" (*Wooley* v. *Maynard*, *infra*, 430 U.S. at 714), is at the heart of this appeal.

The Minimal State Interest

That the State interest asserted by Florida in the promotion and reputation of its products is, at best, a minimal

one was established by this Court's ruling in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). *Pike*, a commerce clause case singularly similar in its facts to the instant case, involved an Arizona statute which prohibited interstate shipment of Arizona cantaloupes except in containers packed in Arizona and "identified as originating in Arizona." *Id.* at 145. The purpose of the Act, as of Rule 20-66.04, was reputational—"to promote and preserve the reputation of Arizona growers." *Id.* at 143. As Justice Stewart observed for the Court:

> "[w]e are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation has long been recognized,' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State." *Id.* at 143 (footnote omitted).*

In *Pike*, the State complained that an Arizona producer had packed its products in California and shipped them "in containers that do not identify them as Arizona cantaloupes"; Arizona thereby lost, it said, "the reflected good will of the company's superior produce." *Id.* at 144. As the State's brief (quoted by this Court) urged, "'[i]t is within Arizona's legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality Parker fruit was grown in Arizona.'" *Ibid.* (footnote omitted) This Court assumed that the "asserted state interest [was] a legitimate one" (*id.* at 144); it nonetheless characterized the State's interest in having the name Arizona placed upon "a product that is superior and well

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* The Florida Supreme Court specifically stated that Rule 20-66.04 labeling was "intended for advertising purposes" and not "intended to deter unscrupulous packers." (7a)

packaged"—just the interest asserted here—as both "tenuous" and "minimal at best", an interest insufficient to overcome a constitutional challenge to the statute. *Id.* at 144, 145, 146.*

Kraft's claim, asserted before the courts below, is that as a matter of well-established First Amendment law, speech which associates an unwilling speaker with views of the State may not be compelled by the State absent a substantial State interest—a State interest far more significant than Florida's here. "[S]ignificant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976) (*per curiam*).

Florida's expressed interest** in enacting Rule 20-66.04 was the same as the State's interest in *Pike*—the enhancement and promotion of the market for State products. That interest, held to be "tenuous" and "minimal" in *Pike* and thus insufficient to justify a constitutional burden, is no more substantial here.

State-Coerced Speech

The free expression protected by the First Amendment encompasses the right, in the face of state compulsion, to refrain from speaking or adopting state speech. With certain narrow exceptions, the state may not force an un-

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* In the more recent decision of *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429 (1978), Justice Blackmun summarized *Pike* as a case in which "despite the unchallenged existence and legitimacy of the State's interest, the Court determined that the interest was not important enough to justify the burden on commerce." *Id.* at 448, 449 (Blackmun, J., concurring).

** The State "has responsibly revealed its express legislative objectives . . . and no other objective is claimed. . . ." *Johnson* v. *Robison*, 415 U.S. 361, 376 (1974).

willing speaker, directly or indirectly, to communicate state opinions or messages.

This Court, in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), held unconstitutional a New Hampshire law requiring that the label "Live Free or Die" be affixed on all passenger vehicle license plates. The Court ruled that the speaker's interest in not associating himself with the State's "point of view" (*id.* at 715) "implicat[ed] First Amendment protections" (*ibid.*), and that absent a countervailing State interest "sufficiently compelling" to justify infringement of this protection, the State law could not be upheld.* The interests asserted by New Hampshire—facilitating the identification of passenger vehicles and promoting appreciation of history, state pride and individualism, interests similar to and no less substantial than Florida's interest in promoting Florida products**—were viewed by the Court as insufficiently compelling: "such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for [the State] message." *Id.* at 717 (footnote omitted).

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* The Court observed that

> "New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty, as Maynard already has. . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715.

** Strikingly, the Court distinguished use of state seals or other official stamps on documents from use of the state labels at issue in *Wooley*, contrasting a state purpose "to advertise the message [the document] bears"—the purpose of the *Wooley* label—and other state goals. 430 U.S. at 715 n.11. This analysis emphasizes the similarity between the State of Florida's advertising interest here and the Court's perception of the state interest in *Wooley*, and strongly suggests the inadequacy of Florida's interest to support the infringement upon free expression which Rule 20-56.04 effects.

The principle established in *Wooley*—that the right not to be associated with views of the state and not to be compelled to speak by the state is protected by the First Amendment—also governs speech in a commercial context. "Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to [petitioner's] beliefs the critical constitutional inquiry." *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 232 (1977). The State may not put its words—even its "commercial" words—in the mouth of an unwilling speaker; nor may it compel a speaker unwillingly to identify itself with State views or opinions —whether these are political, economic, or commercial.*

The Florida Supreme Court came close to recognizing this, acknowledging that had Kraft been obliged to say that "Florida is Best" or "Florida Citrus is Superior", the *Wooley* rationale might well apply.** (18a) However, Kraft, in the court's view, was not required to "agree with

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* Corporations, no less than individuals, must be free from state compulsion to communicate state messages or, as here, to identify themselves with state commercial claims which, in their view, are unsubstantiated or inaccurate. The "inherent worth of speech" does not depend upon the "identity of its source". *First National Bank* v. *Bellotti*, 435 U.S. 765, 777 (1978).

** In fact, the Florida advertisements introduced in the record of this case are both more tendentious, and surely more controversial, than the "Florida Citrus is Superior" language posited by the court. These advertisements, as noted above, claim various nutritional and therapeutic benefits for Florida citrus fruits. One suggests that citrus juice reduces stress; several display pregnant women and suggest that consumption of citrus juices is desirabl during pregnancy. Another, captioned "Chase the Flu Blues", urges citrus juice as a cure for the flu. Several portray doctors and suggest that citrus juice has medicinal value—one goes so far as to explain to doctors "why you should prescribe" orange juice when prescribing diuretics. (90a *et seq.*) These references, quite apart from any questions as to accuracy, might well be viewed as offensive in content by some significant portion of the consuming public, in addition to generating a potentially adverse reaction on the part of consumers in competitive citrus producing states.

or echo the content and theme of Florida's citrus advertising campaign. Rather, [it is] simply being required to indicate that the product being sold came from Florida, so that those consumers desiring Florida-produced citrus will be able to purchase such." (16a)

The opinion below, in its treatment of Kraft's First Amendment rights, is thus reduced to the proposition that because Florida obliges Kraft and others to do no more than place "Florida" or the "Florida Sunshine Tree" on their products, it does not require that they associate themselves with views expressed in Florida's advertisements. This proposition, however, flatly contradicts the *only* stated purpose of the Rule—the desire of the Commission "to relate its consumer advertising programs to a specific product readily identifiable by the consumer in the marketplace." (23a) The Commission cannot have it both ways: it cannot say that only mandatory "Florida" or "Florida Sunshine Tree" identification by Kraft of its grapefruit products will make the State's advertising more effective, but that such identification will *not* associate Kraft with the State's advertising.

We do not suggest that all state compulsion of speech violates the First Amendment.* But the situations in which speech may be compelled are few, and do not include ones where, as here, the compelled speech is not intended to remedy false, misleading or unlawful statements, where the state interest is insubstantial, and where the compulsion

* This Court noted, in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976), that it may be "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent it being deceptive." There is no claim that Rule 20-66.04 was enacted to prevent deceptiveness, or that any of Kraft's own advertising is deceptive.

to speak involves public association with the expression of any particular opinion of the State. *See West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).*

Florida is not unique in its desire to spur the sales of products from the state. Many other states have engaged in promotion of state products. Fourteen states, including California, New York, and Texas (each of which was referred to in testimony as having a successful identification and promotion program (Tr. 223, 291-93)), have voluntary promotional programs, several of which include provision for non-compulsory state labeling. Typically, these programs permit growers or packers to use the state's name or an official state logo on particular products produced within the state on satisfaction of certain standards, on payment of a fee, or unconditionally.** Nonetheless, al-

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* Speech has been compelled under the Federal Trade Commission Act to remedy previously published false advertisements. But even in this unique area, the courts have taken care, in the service of First Amendment precepts, not to "permit a remedy broader than that which is necessary to prevent deception . . . or correct the effects of past deception . . . ." *National Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). *See generally*, Note, *First Amendment Limitations on FTC Corrective Advertising Orders*, 66 Geo.L.J. 1472 (1978). Similarly, under the Sherman Act, the courts have distinguished between enjoining statements describing price competition as "unethical" and affirmatively requiring defendants to state that competitive bidding is ethical. The first has been upheld, the second held violative of the First Amendment. *United States* v. *National Society of Professional Engineers*, 555 F.2d 978, 984 (D.C. Cir. 1977), *aff'd on other grounds*, 435 U.S. 679 (1978).

** In Texas, producers are permitted to affix origin and grade labels if citrus fruit meets certain inspection standards. California similarly requires wine, and New York agricultural products, to meet certain standards before the State name may be placed on the label, but even then do not require the State name to be used. States with voluntary promotional programs include:

(Footnote continued on following page)

(Footnote continued from preceding page)

California, Cal. Admin. Code tit. 17, R. 17,000 *et seq.* (labeling provisions under which wine must meet certain standards to bear "the appellation of origin 'California' . . ."); Georgia, Ga. Code Ann. §§ 5-2901 *et seq.* (1981) (marketing program to promote Georgia products; use of "Georgia Grown" label non-compulsory); Iowa, Iowa Code Ann. § 28.7 (West 1978 & Supp. 1981-82) (interstate marketing of "Iowa Chops"; Iowa Development Commission must authorize use of "Product of Iowa" or "Iowa Chops" labels); Louisiana, La. Rev. Stat. Ann. §§ 3:451 to 3:458 (West 1973 & Supp. 1982) (sweet potato promotional authority; no provision for labeling); Minnesota, Minn. Stat. Ann. §§ 17.101, 17.102 (West 1981) (general agricultural promotional provisions; use of official labels "discretionary"); Mississippi, Miss. Code Ann. §§ 69-7-251 to 69-7-275 (1972 & Supp. 1981) (egg marketing and advertising provisions; use of "distinctive or suggestive" State emblem non-compulsory); New Hampshire, N.H. Rev. Stat. Ann. Ch. 429-A (Supp. 1979) (fruit and fruit products marketing and promotional program; no provision for labeling); New Jersey, N.J. Stat. Ann. §§ 4:10-16 to 4:10-24 (West 1973) (commodity promotional provisions under which right to use State label may be purchased); New Mexico, N.M. Stat. Ann. §§ 76-20-1 *et seq.* (Supp. 1981) (peanut and pecan marketing program; no provision for labeling); New York, N.Y. Agric. & Mkts. Law §§ 156h *et seq.* (McKinney 1972) (agricultural product marketing provisions; use of State label permitted only if State standards are met); North Carolina, N.C. Gen. Stat. §§ 106-120 to 106-202 (1978 & Supp. 1981) (farm products promotional and marketing provisions; use of official "tar-heel" logo non-compulsory); Tennessee, Tenn. Code Ann. § 52-206 (Supp. 1981) (controlled "fancy fresh egg marketing program"; no provision for State labeling); Texas, Tex. Agric. Code Ann. §§ 93.001 *et seq.* (Vernon 1982) (citrus standardization and marketing program; State or foreign country label required for grapefruit sold within Texas); Washington, Wash. Admin. Code R. 16-512-110 (promotional program for Washington chickens; "suggested" use of "Washington Fryer" logo linked to consumer protection program

(Footnote continued on following page)

though the Citrus Commission was of the view* that no other state in the nation has required mandatory display

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requiring that all chickens sold within the State be labeled as to State of origin); Wash. Admin. Code R. 16-403-135 *et seq.* (Washington apple promotion program; grade labeling required with optional use of Washington or U.S.D.A. grade, or both (Wash. Admin. Code R. 16-403-140)).

Some states have no promotional programs as such, but require compliance with grade and inspection standards before the state name may be used to identify a product. Vermont requires maple syrup to meet certain grades before it can be labeled "Vermont maple syrup". Vt. Stat. Ann. tit. 6, § 513 (1972). Virginia requires all hams bearing the Smithfield label to be cured in the town of Smithfield. Va. Code § 3.1-868 (1973). Only "white cap corn grown in Rhode Island soil" may be labeled Rhode Island Corn. R.I. Gen. Laws § 21-25-1 (1963). None of these statutes requires mandatory labeling.

In addition, states have enacted a variety of health and safety and consumer protective labeling regulations, including grading, ingredient, and warning requirements, which the courts have upheld against constitutional challenge on commerce clause and due process grounds. *Compare, e.g., Grocery Manufacturers of America, Inc.* v. *Department of Public Health*, 393 N.E.2d 881 (Mass. 1979), *and Belk-James, Inc.* v. *Nuzum*, 358 So.2d 174 (Fla. 1978) *with Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). *See also, e.g., Swift & Co.* v. *Walkley*, 369 F.Supp. 1198 (S.D.N.Y. 1973); *Dyson* v. *Avoset Food Corp.*, 86 Misc.2d 769, 382 N.Y.S.2d 947 (Sup.Ct. Albany Co. 1976). *Cf. American Meat Institute* v. *Ball*, 520 F.Supp. 929 (W.D. Mich. 1981).

Beyond the non-compulsory nature of the promotional requirements, this list demonstrates the potential burden which mandatory state-by-state promotional labeling could place on national manufacturers. Unlike health, safety and consumer protection labeling, state advertising labels will differ from state to state, the purpose of each program being to set the state's products apart from products of other states.

* The general manager of the Florida Citrus Commission and executive director of the Department of Citrus, Edward A. Taylor, testified as follows:

"Q. Mr. Taylor, did you check to determine whether in any of the states about which you testified with regard to state origin declarations on labels of wines, did you check to determine whether in any of those states there is a mandatory requirement?

(Footnote continued on following page)

of the state's name or application of a state logo or symbol on products in order to identify them with state advertising, it chose to enact just such a requirement.*

The Commercial Context of Florida's Advertising Claims

There remains the final stated justification for overcoming what both courts below apparently conceded would otherwise be Kraft's right *not* to be associated with Florida's advertising claims. That is the notion, as phrased by the Florida Supreme Court, that although "with certain exceptions, an entity may not be compelled to convey a message simply because that message is in a commercial context", in this case the purely commercial interests of

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(Footnote continued from preceding page)

"A. To my knowledge, there's no mandatory requirement. There are certain requirements to use the designation, as I so indicated, in California. They must make it out of grape sugars rather than cane sugars.

"Q. So, some California wine is not even eligible to be labeled.

"A. Correct.

"Q. Whether it is or is not eligible, am I correct in assuming that the California producer is free to ship California wine then without the declaration?

"A. That would be my understanding, yes.

"Q. Did you happen to check with any other food commodities about which we're here, origin statements, and did you find there to be any mandatory requirement in any of those states, about any of those products?

"A. I didn't personally check. It was checked by a member of the staff and I don't believe—the answer to your question is no, there was no mandatory." (Tr. 297-98)

* Our own research confirms that of all the fifty states, only Florida has imposed a mandatory State labeling requirement with respect to processed foods. Idaho appears to impose such a requirement on packagers of potatoes grown in the State. Idaho Potato Commission Reg. B 9.01. The mandatory promotional labeling of processed food may raise questions somewhat different from labeling of unprocessed products, especially where growers of fresh products fund and control the advertising. In any event, however, in imposing a compulsory promotional labeling requirement, Florida's position remains a lonely one.

Kraft are overcome by the "public's interest in protecting and promoting Florida's citrus crop." (18a)

This argument simply misses the point. To view this case, in the first instance, as one involving Kraft's commercial speech is to turn it inside out. The only commercial speech here is Florida's. Florida, under Rule 20-66.04, promotes its products by requiring, at pain of criminal sanctions, that Kraft and others associate themselves with State advertising. If anything, the "commercial" nature of Florida's speech and the exclusively commercial motivation for Rule 20-66.04 should lessen the weight attached to the State's interest in the normal First Amendment balance, not require application of less rigorous commercial speech standards to the other side of the equation.

Even if Kraft's desire to remain silent were viewed as wholly commercial, however, Florida's interest in promoting its State products could not, under this Court's commercial speech precedents, overcome Kraft's First Amendment rights. Since this Court's ruling in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), it has been clear that:

> "If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the govern-

> ment's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* at 564.

The questions thus become* whether Florida's interest in the reputation of its products is sufficiently "substantial", a matter as to which this Court has previously held the interest to be "minimal at best", *Pike* v. *Bruce Church, Inc., supra;* whether the regulation provides "only ineffective or remote support for the government's purpose", a matter as to which the Commission itself conceded it had no firm evidence of any sort**; and whether a more "limited restriction on commercial speech" would suffice. As to the final test, the fact that other states engaged in promotion of state products have used more "limited" measures which do not require mandatory identification is surely probative. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979). Florida might have enacted a non-compulsory labeling program, similar to the one tried for a period of one year before passage of the mandatory program. During that year, there was a material increase in the use of "Florida" or the "Florida Sunshine Tree" on processed grapefruit products—30% in the aggregate and as much as 65% in some categories. (*See* discussion

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* There is no suggestion here that any speech (or silence) of Kraft's is either misleading or related to any unlawful activity.

** The market research director of the Department of Citrus, Douglas Hoffer, testified as follows:

> "Q. Do we have any proof, any data, any evidence of any kind and, if so, what is it, that shows that Florida origin motivates consumers or will motivate consumers to buy more Florida orange juice or more Florida grapefruit juice?
> "A. I don't think so, no." (Tr. 348)

See also supra, at 5, n.**.

supra at 9.) The Commission, however, made no finding as to the adequacy of the non-compulsory program,* and simply voted, as proposed by its majority of grower members, not to continue it.

CONCLUSION

The questions presented by this appeal are substantial. Probable jurisdiction should be noted and the case set down for argument.

Respectfully submitted,

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* "'[T]he onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden.'" *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981) (citation omitted).

Appendix

Index to Appendices

APPENDIX— PAGE

A. Opinion of the Supreme Court of Florida 1a

B. Order of the Department of Citrus 21a

C. Opinion of the District Court of Appeal 26a

D. Order Denying Rehearing 60a

E. Notice of Appeal 62a

F. Constitutional and Statutory Provisions 66a

G. Testimony of Dr. Jerry F. Proctor 77a

H. Photographs of Citrus Commission Advertisements Carried in Magazines and on Television 90a

APPENDIX A

Opinion of the Supreme Court of Florida

SUPREME COURT OF FLORIDA

No. 57,108

THE COCA-COLA COMPANY, FOOD DIVISION, POLK COUNTY, FLORIDA, *et al.*,

Appellants,

vs.

STATE OF FLORIDA, DEPARTMENT OF CITRUS,

Appellee.

[June 4, 1981]

ADKINS, J.

This is an appeal from a decision of the Second District Court of Appeal specifically passing upon the validity of section 601.15, Florida Statutes (1977). We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. (1972).

On October 25, 1977, the Florida Citrus Commission (hereinafter the commission), by order, adopted a rule amending Department of Citrus Rule Chapter 20-66. The new rule, subsection 20-66.04 (hereinafter the rule), provides that effective January 1, 1979, all processed 100% grapefruit products packed in retail containers in Florida are to be prominently identified by use of the word "Florida" or the "Florida Sunshine Tree" certification mark surrounded by the phrase, "A product of the Florida Sunshine Tree." The rule also specifies certain re-

quirements regarding the legibility, color, and placement of the words and certification mark. The order adopting the rule finds, among other things, that the rule serves the interests of the public and the industry, that it will increase the effectiveness of the Department of Citrus' advertising program, that grapefruit growers have expressed a need for Florida identification on processed products, and that evidence produced at hearings demonstrated that Florida identification will help achieve the goals enumerated in section 601.02, Florida Statutes (1977).

Upon adoption of the rule, a grapefruit products processors' association and individual members thereof petitioned the Second District Court of Appeal for review of the commission's action in adopting the rule. The petition asserted that the commission lacked statutory authority to promulgate the rule or, alternatively, that the rule violated provisions of the Federal and Florida Constitutions.

Initially, petitioners also contended that since the rule evidently applied to grapefruit products derived wholly or in part from grapefruit grown outside of the state, it was in violation of section 601.98, Florida Statutes (1977), which provides that it is unlawful to place a designation of Florida origin on citrus fruit products if any part thereof comes from outside the state. The department, however, made a statement, which the district court considered binding, that the rule applies only to processed grapefruit products packed in Florida which are derived entirely from grapefruit grown in Florida.

On the basis of the above statement, the district court affirmed the department's action, holding that the department has the implied statutory authority to adopt the

rule, that said authority does not constitute an invalid delegation of legislative power, that the rule violates neither the federal nor state constitution, that evidence regarding increased competition from out-of-state grapefruit justifies the rule, and that the department's failure to prepare an economic impact statement did not invalidate the rule. *See Florida Canners Association* v. *State Dept. of Citrus,* 371 So.2d 503 (Fla. 2d DCA 1979). Petitioners then appealed the decision to this Court. Petitioners-below shall be referred to herein as appellants, and respondent-below referred to as appellee or department.

Appellants' first point on appeal is that appellee lacks statutory authority to compel a declaration of Florida origin on the labels of processed grapefruit products. We agree that the Florida Citrus Code of 1949 (hereinafter the code) does not expressly grant such authority, and so such power, if it is to be ascribed to appellee, must be implied. We have, in numerous cases, discussed when authority may properly be implied.

"The powers of this and similar agencies include both those expressly given and those given by clear and necessary implication from the provisions of the statute." *City Gas Company* v. *Peoples Gas System, Inc.,* 182 So.2d 429, 436 (Fla. 1965). The implied powers attendant to those expressly given include those which are "indispensable or useful to the valid purposes of a remedial law", *State ex rel. Railroad Commiss.* v. *Atlantic Coast Line R. Co.,* 60 Fla. 465, 54 So. 394, 397 (1911); those "necessary for the exercise of the [right] or the performance of the [duty]", *Girard Trust Co.* v. *Tampashores Development Co.,* 95 Fla. 1010, 117 So. 786, 788 (1928); those "necessary to accomplish the [stated governmental pur-

pose]", *Hancock* v. *Karel*, 127 Fla. 451, 173 So. 274, 275 (1937), citing *Bailey* v. *Van Pelt*, 78 Fla. 337, 82 So. 789, 792 (1919); and those "necessary to carry out the power or right and make it effectual and complete", *Deltona Corporation* v. *Florida Public Service Commission*, 220 So.2d 905, 907 (Fla. 1969). Thus to determine whether the commission has the implied authority to require declarations of origin, we must examine the code to determine both its purposes and the duties which it places on the commission. (For a comprehensive history of the code, see the Second District Court of Appeal's decision in this cause.)

Section 601.02, Florida Statutes (1977), provides, in part, the following regarding the purposes of the code:

> Purposes.—This chapter is passed:
>
> (1) In the exercise of the police power to protect health and welfare and to stabilize and protect the citrus industry of the state.
>
> (2) Because . . . the sale and distribution of said crop, affects the health, morals, and general economy of a vast number of citizens of the state who are either directly or indirectly dependent thereon for a livelihood, and said business is therefore of vast public interest.
>
> (3) Because it is wise, necessary, and expedient to protect and enhance the quality and reputation of Florida citrus fruit and the canned and concentrated products thereof in domestic and foreign markets.
>
> • • •
>
> (5) To stabilize the Florida citrus industry and to protect the public against fraud, deception, and fi-

> nancial loss through unscrupulous practices and haphazard methods in connection with the processing and marketing of citrus fruit and the canned or concentrated products thereof.

Section 601.10, in part, establishes the following regarding the powers of the department.

> Powers of the Department of Citrus.—The Department of Citrus shall have and shall exercise such general and specific powers as are delegated to it by this chapter and other statutes of the state, which powers shall include, but not be confined to, the following:
>
> (1) To adopt and, from time to time, alter, rescind, modify, or amend all proper and necessary rules, regulations, and orders for the exercise of its powers and the performance of its duties under this chapter and other statutes of the state, which said rules and regulations shall have the force and effect of law when not inconsistent therewith.

Section 601.15, which most directly relates to the rule, provides, in part, as follows:

> Advertising campaign; methods of conducting;
>
> * * *
>
> (2) The Department of Citrus shall plan and conduct a campaign for commodity advertising, publicity, and sales promotion to increase the consumption of citrus fruits and may contract for any such advertising, publicity, and sales promotion service.

Section 601.15 assigns appellee certain duties which, when performed, are intended to increase the consump-

tion of citrus fruits. The increased consumption helps achieve the goals of the act listed in section 601.02, Florida Statutes (1977).

The question then, in determining whether appellee has the implied authority to require designation of origin, is whether the rule is indispensable, useful or necessary in effecting the goal of increased consumption of Florida citrus. We think that it is. If citrus is not identified as being of Florida origin, then the money spent encouraging consumers to buy Florida citrus will be for naught. Those consumers favorably impressed with appellee's advertising campaign will be unable to determine which citrus is from Florida, and will be just as likely to purchase grapefruit from California, Arizona, Mexico, Brazil, etc., as from this state. The increasingly stiff competition facing our state from other citrus producing locales justifies this measure intended to promote consumption of *Florida* citrus. Appellee has been given extensive authority in this very important area, and we believe that it has the implied power, as part of its duty to promote Florida citrus, to order that grapefruit products grown and processed in this state be so identified.

We are likewise unconvinced by appellants' argument that the legislative history of the code demonstrates that the legislature expressly rejected compulsory declarations of Florida origin. Appellants point out that the legislature enacted in 1937, and then repealed in 1939, a statute compelling a declaration of Florida origin on processed citrus products. See chapter 17783, Laws of Florida (1937), and chapters 19261 and 19477, Laws of Florida (1939). Noting that the statutes upon which appellee relies for its implied authority for the rule existed prior to the above 1937 statute, appellants argue that had the legislature considered

such implied authority to exist, it would not have enacted the 1937 statute requiring a declaration of origin. Enactment of said statute, argue appellants, demonstrates that implied power to compel designation of origin did not exist and, rather, that the legislature had to expressly provide such. The repeal, two years later, of chapter 17783 evidences a clear legislative rejection of mandatory declarations of origin, claim appellants.

There are two flaws in appellants' reasoning. First, the 1937 enactment did not concern advertising, rather, it was intended to eliminate the practice of importing non-Florida citrus into the state and then shipping it out in a form indicating that it was a Florida citrus product. When the law was repealed in 1939, it was replaced by a statute prohibiting the shipment from Florida of non-Florida citrus fruit or juice in a manner tending to indicate in any way that said product was produced and canned in Florida. Thus, the enactment and repeal of chapter 17783 are of no consequence here, because said law pertained to mandatory labeling intended to deter unscrupulous packers, not to labeling intended for advertising purposes.

The second flaw in appellants' reasoning is that the legislative enactment and repeal of chapter 17783 was not really a grant and rejection of power at all. Rather, it was an exercise of concurrent jurisdiction shared by the legislature and the department. Certainly the two entities may share authority over a common area, and the legislature's actions in 1937 and 1939 need not be interpreted first, as an expression of sole authority to mandate labeling and second, as an express rejection of all forms of such labeling. Instead, borrowing language used in the district court of appeal's opinion herein, we believe that the legislature

simply stepped into a field already occupied by appellee and then stepped out, leaving the matter again in the hands of appellee.

Appellants' second point on appeal is that the statutory authority for this rule, if such authority is found to exist (and we have so found), constitutes an invalid delegation of legislative power. The delegation is invalid, contend appellants, because it contains no appropriate standards, guidelines, or restraints and thus violates article III, section 1 of the Florida Constitution. We disagree.

We need not examine the provisions of the constitution prohibiting the delegation by the legislature of exclusively legislative powers, nor the reasoning whereby the authority to provide rules and regulations for the administration of the law may be delegated to an administrative agency. Both concepts have been thoroughly examined in numerous prior decisions of this Court. *See*, for example, *State* v. *Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969 (1908); *Bailey* v. *Van Pelt*, 78 Fla. 337, 82 So. 789 (1919); *Askew* v. *Cross Key Waterways*, 372 So.2d 913 (Fla. 1978).

To resolve this issue, we must consider whether the commission is here given the power to decide what the law is to be or whether the code establishes policy and standards and guidelines to guide the agency in implementing legislatively directed law. If the former is the case, the delegation is unlawful; if the latter, it is unobjectionable on delegation grounds. We find, for the following reasons, that the delegation here complained of was legal.

First, the act is not couched in terms so vague and uncertain, nor so broadly drawn, that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement thereof, and the agency is not given the power to say what the law is. *See D'Alemberte* v.

Anderson, 349 So.2d 164 (Fla. 1977); *Lewis* v. *Bank of Pasco County*, 346 So.2d 53 (Fla. 1976); and *Sarasota County* v. *Barg*, 302 So.2d 737 (Fla. 1974). The code clearly demonstrates that the legislature intends that the department plan and conduct an advertising and publicity campaign designed to increase consumption of Florida citrus products. Section 601.15 states that the department "shall" do such. It does not leave the department a choice of whether to use the revenues earmarked for advertising for such purposes nor a choice of whether to initiate an advertising campaign. The department is not given unbridled discretion to determine whether to advertise and how to use the funds derived from the tax imposed under section 601.15. All of the preceding are required or specified. Nor, focusing more closely on its implementation does the act lack minimal standards and guidelines for administration of the program established by the legislature.

Sections 601.15(2)(a)—(i) catalog the subjects on which the department is to disseminate information. They direct that the department inform the public, via advertising and publicity, of matters such as the nutritional importance of citrus, the laws of the state regulating the production and marketing of citrus, the added costs to producers resulting from those laws, the effect upon public health of a breakdown of the Florida citrus industry, and the like. Said sections provide the department definite guidelines for implementation of the legislatively established policy and purpose of section 601.15. The department may not determine what the law shall be, and a reviewing body is able to ascertain by reference to the code whether the agency is carrying out the legislature's intent.

Also relevant is section 601.10(1), which provides that the department is to have the following powers:

> To adopt and, from time to time, alter, rescind, modify, or amend all proper and necessary rules, regulations, and orders for the exercise of its powers and the performance of its duties under this chapter. . . .

The department is thereby limited to adopting only rules and regulations which are proper and necessary to accomplish the legislature's stated objective, and may not stray afield as it pleases, exercising the unlimited discretion which is a hallmark of improper delegation. Section 601.10 (1) provides the requisite definite, valid limitations on rules and regulations which may be enacted by the department.

The department has been given responsibility for advertising and promoting Florida citrus, and increasing the sales thereof. In delegating such authority to the department, the legislature has established guidelines and directives for implementation of the law. Should the need arise, the code provides a reviewing body an adequate basis for determining whether the department is properly carrying out the intent of the legislature. We therefore conclude that the delegation of authority to promulgate the rule is proper.

Appellants' third point on appeal is that the rule unconstitutionally deprives them of their property without due process of law. They argue that to justify an interference with the constitutionally protected right to pursue a lawful business, the state must show a proper exercise of its police power, and that such cannot be shown here.

Under the police power doctrine, the state may interfere with otherwise protected areas if the interfering regulation bears "a reasonable relationship to the public safety, health, morals, and general welfare." *Stadnik* v. *Shell's City, Inc.*, 140 So.2d 871, 874 (Fla. 1962). In *Belk-James, Inc.* v.

Nuzum, 358 So.2d 174 (Fla. 1978), the question was whether a requirement that all taxable malt beverages sold in Florida have the word "Florida" imprinted on the crown or lid thereof violated the due process clauses of the United States and Florida Constitutions. Observing that the standard for evaluating a legislative "exercise of the police power in the area of economic regulation is whether the means utilized bear a rational or reasonable relationship to a legitimate state objective", *id.* at 175, we held that the labeling requirement was justified as an aid in the collection of taxes on malt liquor and in ensuring that only wholesome beer is brought into the state. In so holding, we observed as follows:

> The arguments advanced by Belk-James, which essentially question whether the best means of regulation has been chosen, can be seen as directed more to the wisdom of the legislation than to its asserted rationality. This inquiry, of course, is inappropriate for our judicial function.

Id. at 177.

The labeling requirement in the case *sub judice*, like that in *Belk-James*, bears a rational relationship to a legitimate objective; in this case, increased sales of Florida citrus. Whether it is the best means of achieving that goal is not important to our analysis.

Appellants argue that all police power regulations of the citrus industry which have heretofore been upheld by this Court have been based upon a showing that the rule was necessary to prevent fraud and deception. They also cite a case in which the Fourth District Court of Appeal held that economic considerations are an improper basis for

exercise of the police power. *See Florida Citrus Commission* v. *Hi-Acres Concentrate, Inc.*, 227 So.2d 707 (Fla. 4th DCA 1969), *cert. denied*, 241 So.2d 859 (Fla. 1970).

In *Hi-Acres*, the court held unconstitutional a rule adopted by the commission which required that composition-type containers of frozen concentrated citrus juice have an "easy open" top, observing:

> The commission's determination that requiring the composite type can to have the easy open feature would benefit the citrus industry by increased sale of citrus juices, is simply a determination by such administrative agency that using such type containers would result in economic benefits to the industry. This alone is not a valid basis upon which such regulation can be justified.

Id. at 708. We disagree with the opinion in *Hi-Acres* to the extent that it holds economic considerations an improper basis for exercising the police power.

Police power based regulations of Florida's citrus industry have been upheld in many cases. *See Sligh* v. *Kirkwood*, 237 U.S. 52 (1915); *Snively Groves, Inc.* v. *Florida Citrus Commission*, 23 F. Supp. 600 (N.D. Fla. 1938); *Florida Citrus Commission* v. *Golden Gift, Inc.*, 91 So.2d 657 (Fla. 1956); and *L. Maxcy, Inc.* v. *Mayo*, 103 Fla. 552, 139 So. 121 (1931). As noted by appellants, most sustained the validity of a rule because it was shown that said rule was needed to prevent fraud and deception. That does not mean, however, that a police power rule may not be based on economic considerations. In *Sligh* v. *Kirkwood* the United States Supreme Court, referring to the police power, noted:

> It embraces regulations designed to promote public convenience or the *general prosperity* or welfare, as well as those specifically intended to promote the public safety or the public health.

Id. at 59 (emphasis supplied).

In *E. B. Elliot Adv. Co.* v. *Metropolitan Dade County,* 425 F.2d 1141 (5th Cir.), *cert. dismissed,* 400 U.S. 805 (1970), the United States Fifth Circuit Court of Appeals considered whether an ordinance prohibiting commercial advertising signs in certain areas and regulating them in others was a proper exercise of the police power and observed:

> Ordinance No. 63-26 is apparently designed to accomplish two ends: to promote highway safety on the expressway system of Dade County and to improve the beauty of the land surrounding these expressways thus to maintain and increase the attractiveness of the area to tourists, and residents alike, *and thus influence the economic prosperity of the county.* There can be no doubt but that these objectives are constitutionally permissible under the police power of the State of Florida.

Id. at 1151 (emphasis supplied).

In *Johnson* v. *State,* 99 Fla. 1311, 128 So. 853 (1930), the constitutionality of an act making unlawful the obstruction or resistance of an authorized inspector from the department of citrus in the performance of his duties was questioned. This Court held that the act was a proper exercise of the police power, stating:

> [T]he purpose of the act is within the police power of the state. The protection of a large industry constitut-

> ing one of the great sources of the state's wealth and therefore directly or indirectly affecting the welfare of so great a portion of the population of the state is affected to such an extent by public interest as to be within the police power of the sovereign.

Id. at 857. *See also C. V. Floyd Fruit Co.* v. *Florida Citrus Commission,* 128 Fla. 565, 175 So. 248 (1937).

In light of the foregoing and of the indisputably important role that the citrus industry plays in this state's economy, we hold that the rule under consideration is a proper exercise of the state's police power.

Nor do we find the rule to be an unjustifiable infringement of the appellants' rights, *i.e.* an unnecessary exercise of the police power. Appellants argue that if a Florida identification will actually increase sales of citrus products, then producers and sellers will voluntarily mark their products in that fashion. Hence, they reason, the rule is unnecessary, and the goals thereof may be achieved without this unjustifiable infringement. They cite *State* v. *Leone,* 118 So.2d 781 (Fla. 1960), for the proposition that if the legislative goals of an act can be accomplished without any infringement upon a party's rights, then infringement, if it occurs, is unjustifiable.

In *Leone,* this Court struck a police power regulation requiring that retail drug stores be under the constant supervision of a licensed pharmacist. The opinion therein noted that the goal of the statute, that controlled drugs and medical supplies be dispensed only by those with proper training, could be achieved with less infringement on individual rights than was being done.

> If there is a choice of ways in which government can reasonably attain a valid goal necessary to the public

> interest, it must elect that course which will infringe the least on the rights of the individual.

Id. at 785. We do not think, however, that the valid goal in the case at bar may be reasonably attained with less infringement than is presently being imposed.

Appellants assert that their interests and those of the department are the same, and that no regulation is needed. They argue that if a "Florida" label will increase sales, they will certainly mark their products with such. We, however, do not think that appellants' interests exactly parallel those of the department. The department's goal is to achieve the maximum sales possible of *Florida* citrus products. Several of the appellants, on the other hand, have holdings and dealings in other regions as well as in Florida. While they too desire to maximize sales, their particular interests might involve balancing output from a number of states or countries. An enterprise with interests and commitments spanning the nation and even the world cannot place the interests of a single state foremost on its list of priorities, and cannot be expected to always do that which is best for Florida. Thus appellants' and appellee's interests are not synonymous, the rule is needed and is not an unnecessary infringement, and we hold that the rule is reasonably related to attainment of the stated governmental objective.

Appellants' next point on appeal is that the rule impermissibly abridges their first amendment rights. In so arguing, appellants first contend that the labeling mandated by the rule compels that they speak and adopt the statements of the state of Florida and become a messenger therefor. We disagree. They are simply required to indicate the origin of their product, if it originated in Florida. They

are not being forced to trumpet the superiority or virtues of Florida citrus, and to suggest that this labeling requirement forces them to spread the "Florida message" exaggerates the rule's effect. Appellants are merely being required to provide a factual statement which, if necessary and proper as this one is, is not an improper invasion of their first amendment rights.

On the same point appellants next contend that the state may not tell anyone what to say or think, and that the rule improperly forces appellants to express an opinion. We agree that the state may never force one to adopt or express a particular opinion:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, *or other matters of opinion* or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624, 642 (1943) (emphasis supplied) (footnote omitted). We do not, however, agree that the mandatory labeling required by the rule forces appellants to confess their faith in a matter of opinion. Again, we note that appellants are not being required to agree with or echo the content and theme of Florida's citrus advertising campaign. Rather, they are simply being required to indicate that the product being sold came from Florida, so that those consumers desiring Florida-produced citrus will be able to purchase such. Stamping a container "Florida" is not expression of an opinion. It is an expression of fact, similar to listings of ingredients and the like. The strictures of *Barnette*, con-

demning forced adherence to opinions, are inapplicable here.

Appellants also cite the United States Supreme Court's decision in *Wooley* v. *Maynard,* 430 U.S. 705 (1977), as support for their position that this mandatory labeling is an unlawful forced expression of opinion. In *Wooley,* a Jehovah's Witness challenged the New Hampshire statute requiring that automobile license plates carry a state motto, "Live Free or Die", which he found morally, religiously, ethically and politically abhorrent. The plaintiff had been prosecuted and jailed for covering the spot where the motto was stamped on his license plate. Holding that the state could not require that one display such a motto, the Supreme Court noted, in part, as follows:

> We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.
>
> • • •
>
> New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message—or suffer a penalty, as Maynard already has. . . . The first Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Id. at 713-15 (citations omitted).

We do not agree with appellants that the holding in *Wooley* compels that we strike down the rule. The state is not requiring that appellants disseminate an ideological message nor that they express a view or opinion on a subject on which there can be differing positions. Appellants are merely being required to include a factual statement of origin. Were the state requiring a message such as "Florida is Best", "Florida Citrus is Superior", or the like, the *Wooley* rationale might apply; as things stand, it does not.

Still contending that the rule violates the first amendment, appellants next assert that the state may not interfere with an otherwise protected area simply because the interests and speech involved are of a commercial nature. We agree that commercial speech is also protected, and that with certain exceptions, an entity may not be compelled to convey a message simply because that message is in a commercial context. When there is a first amendment interest at stake in commercial speech, that interest must be balanced against the public interest served by the regulations. *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

Balancing the competing interests here, we are of the opinion that the public's interest in protecting and promoting Florida's citrus crop justifies the slight infringement on appellants' rights. The state is neither attempting to stop the free flow of information nor to prevent appellants from expressing themselves on any subject. It is simply requiring that containers be marked with a small, factual, statement of origin, on the top or bottom of the container if not the label. The interference with first amendment rights is slight and, as previously noted, the interest served great.

Finally, still regarding the first amendment argument, we do not believe that there exist less restrictive alter-

natives for accomplishing the goals of the rule. The voluntary program of labeling suggested by appellants is not feasible; if they are opposing such labeling this strenuously in court, they certainly would not adopt it voluntarily. The rule is as unrestrictive as is possible under the circumstances.

Appellants' final point on appeal is that the rule is invalid because it is not supported by competent, substantial evidence and that the facts require that it be set aside as a matter of law. They contend that no hearing was held on the rule as it has now been interpreted by the district court of appeal and that at the time evidence was taken, the growers thought that the rule would stop the importation into Florida of citrus for mixing with Florida citrus. We do not find such arguments convincing. While the rule will not stop such importation, it will prevent such mixtures from being marketed as purely Florida citrus. Furthermore, even if the rule was not fully understood by growers at the time evidence was taken thereon, they did, nevertheless, have an opportunity to be heard. The rule has not been changed, and we cannot strike it simply because certain parties may have misinterpreted its purpose or effect.

Appellants further contend that this improperly passed rule will encourage processors to import citrus from other states to mix with Florida citrus in order to avoid the labeling requirement, and that insufficient evidence was presented at hearings on the rule to show that it is needed or will be effective. The district court of appeal ably responded to these assertions in its opinion:

> An exercise of police power will not be struck down because a law or regulation is unwise, improper, or out of harmony with a particular school or thought.

> *Williamson* v. *Lee Optical of Okl.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). We feel that the evidence in the record as to the anticipated increase in competition from non-Florida grapefruit is sufficient to justify Respondent's decision to require that Florida grapefruit products be identified in the marketplace. The wisdom of that decision is not a matter of judicial concern.

Florida Canners Association at 519.

Having considered each of the points on appeal raised by appellants, and having found that none warrant reversal of the Second District Court of Appeal's opinion herein, we hereby affirm said court's decision.

SUNDBERG, C.J., OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur
BOYD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the District Court of Appeal, Second District—Case No. 77-1921

APPENDIX B

Order of the Department of Citrus

FLORIDA CITRUS COMMISSION
Order No. 0-77-21

FLORIDA CITRUS COMMISSION

AN ORDER Authorizing the Adoption, by Filing with the Secretary of State, of:

Amendment #1 to Department of Citrus

Rule Chapter 20-66

Creating a New Rule Subsection 20-66.04, Requiring Florida Identification on All Processed 100% Grapefruit Products Packed in Retail Containers in Florida

AUTHORITY: This Order is issued pursuant to Sections 601.02, 601.10(1), 601.11, 601.15(2), (3) and (7), 601.157, 601.98 and 601.99, Florida Statutes.

CONCLUSIONS OF LAW: Section 601.02, Florida Statutes, provides that the entire Citrus Code is adopted pursuant to the exercise of the police power to protect the citrus industry of the state and in order to protect and enhance the quality and reputation of Florida citrus fruit and processed citrus products in domestic and foreign markets, because the sale of such citrus and citrus products affects the public welfare and general economy of vast numbers of citizens of the state, and it is therefore necessary to stabilize the Florida citrus industry and protect the public against financial loss through haphazard methods in the marketing of citrus fruit and processed citrus products.

Appendix B—Order of the Department of Citrus

Sections 601.10(1) and 601.11, Florida Statutes, authorize the Department of Citrus to adopt all rules necessary to carry out its powers and duties, including rules governing the labeling of Florida fresh citrus fruits and processed citrus products.

Sections 601.15(2) and (7), Florida Statutes, authorize the Department of Citrus to conduct commodity advertising, publicity and sales promotion programs to increase the consumption of Florida fresh citrus fruit and processed citrus products.

Section 601.15(3), Florida Statutes, imposes a basic excise tax on grapefruit, and Section 601.157, Florida Statutes, imposes an additional excise tax on grapefruit for processing purposes, which taxes are paid by the Florida grapefruit growers to the Department of Citrus and are required by law to be used by the Department for commodity advertising, merchandising and sales promotion of Florida grapefruit and processed grapefruit products.

Sections 601.98 and 601.99, Florida Statutes, require that all citrus products be labeled or designated in such manner as to insure that the purchaser thereof be aware of the true geographic origin of such products.

FINDINGS OF FACT: The Florida Citrus Commission, as agency head of the Department of Citrus, having considered all of the testimony and evidence presented at its announced public hearings on this matter held:

August 19, 1975
September 16, 17 and 18, 1975
October 14 and 15, 1975
December 16, 1975
April 20, 1976
April 13, 1977

Appendix B—Order of the Department of Citrus

May 17, 1977
September 20, 1977

hereby finds:

1. That the public interest would be best served and the entire Florida grapefruit industry would benefit if processed grapefruit products of Florida origin were clearly identified on consumer containers as those products covered by the Department's commodity advertising and promotional programs.

2. That such product identification would enable the Department of Citrus to more effectively utilize the grapefruit growers' tax funds by enabling the Department to relate its consumer commodity advertising programs to a specific product readily identifiable by the consumer in the marketplace in the face of increasing competitiveness of grapefruit products from other grapefruit producing areas.

3. That such consumer recognition of Florida grapefruit products should increase the effectiveness of the Department's commodity advertising and promotional programs and result in a benefit to consumers, growers, handlers, and processors of Florida grapefruit products.

4. That Florida grapefruit growers, whose excise tax revenues finance the industry's commodity grapefruit advertising and promotional programs have strongly expressed a need for Florida identification on processed grapefruit products.

5. That evidence produced at the hearings was sufficient to indicate that such identification of Florida grapefruit products would increase consumer awareness and assist in

returning to the Florida grapefruit grower the average cost of production, thereby effectuating the declared purposes of Section 601.02, Florida Statutes.

6. That the rules of evidence were substantially relaxed during the term of these hearings so that interested persons could freely present their views and feelings without being unduly restrained by formal evidentiary requirements. The magnitude of the resulting record of these proceedings evidences that all interested persons were given a complete and full opportunity to present any evidence, testimony, statements, views, opinions or other matters reflecting on the need for and effect of the adoption of this rule.

7. That some evidence indicates there will be initial cost involved in compliance with the rule; however, the evidence further indicates that such costs would be minimal and in the long run would be offset by the increased benefits to the grower, processor and consumer. Traditionally, within the Florida citrus industry, such increased costs are ultimately borne by the citrus grower, who, in this case, has overwhelmingly expressed support for Florida identification on products processed from grapefruit produced by the Florida grapefruit grower, even though he may ultimately bear the cost of such identification.

8. That the rule hereby adopted would make it mandatory that an appropriate Florida identification appear on all retail containers of processed 100% grapefruit products and that such rule provides sufficient lead time for compliance.

9. That proper notice constituting direct and timely notice to all persons and parties who would be affected by

the adoption of this rule amendment was accomplished by the Department of Citrus.

10. That all procedure requirements of Chapter 120, Florida Statutes, applicable to this subject matter, have been properly complied with.

11. That this rule amendment should become effective at 12:01 A.M., January 1, 1979.

THEREFORE, based upon the above findings:

IT IS HEREBY ORDERED

That amendment No. 1 to Department of Citrus Rule Chapter 20-66, as attached hereto, be and the same is hereby approved for filing with the Secretary of State to be thereby adopted, to be effective as of 12:01 A.M., January 1, 1979.

DONE AND ORDERED at a public meeting and hearing held in Lakeland, Florida, October 25, 1977.

/s/ DENFORTH K. RICHARDSON
DENFORTH K. RICHARDSON, Chairman
Florida Citrus Commission

Attest: W. BERNARD LESTER,
Secretary

(SEAL)

APPENDIX C

Opinion of the District Court of Appeal

DISTRICT COURT OF APPEAL OF FLORIDA

No. 77-1921

May 16, 1979

The Florida Canners Association, a Florida Corporation, *et al.*,

Petitioners,

v.

State of Florida, Department of Citrus,

Respondent.

Danahy, Judge.

This is a petition to review the final agency action of Respondent in adopting Florida Administrative Code Rule 20-66.04, which reads as follows:

20-66.04 Florida Identification:

> Effective January 1, 1979, all processed 100% grapefruit products packed in retail containers in Florida shall be prominently identified by use of the word "Florida" or the Florida Sunshine Tree registered certification mark (U.S. Reg. No. 941,773) as described in, and authorized by, Department of Citrus Rule 20-94, including the surrounding phrase "A Product of the Florida Sunshine Tree." To be prominent when placed on the label, the word "Florida" or the certification mark shall be clearly legible, appear at least

> one time in a conspicuous location and be in a size and contrasting color so as to be readily seen under general conditions of purchase. To be prominent, when printed or embossed on the container end, the word "Florida" or the certification mark shall be clearly legible, be in a conspicuous size and, if printed, be in a contrasting color, so as to be readily seen under general conditions of purchase.

Pursuant to a joint stipulation and motion, this court has entered an order staying the effectiveness of Rule 20-66.04 pending disposition of this case in this court.

Petitioner Florida Canners Association is a nonprofit trade association whose members include substantially all processors who pack processed grapefruit products in Florida. Each of the other petitioners is a member of Florida Canners Association and each packs substantial quantities of processed grapefruit products in retail containers in Florida. Each markets its own production of processed citrus products. A number of the petitioners advertise and promote brands owned by them or their customers.

A container of processed grapefruit products packed in Florida may hold products derived solely from grapefruit grown in Florida or it may contain a blend of products from grapefruit grown in Florida and grapefruit grown out of the state.

Petitioners have launched a multi-pronged attack on Rule 20-66.04, asserting first that Respondent lacks statutory authority to promulgate such a rule, and alternatively that the rule violates provisions of the federal and Florida constitutions. Initially, Petitioners' challenge was directed in large part to the fact that the rule on its face appears

to apply not only to grapefruit products derived entirely from grapefruit grown in Florida, but to grapefruit products derived wholly or partly from grapefruit grown outside the state. Since it is unlawful in this state to place a designation of Florida origin on citrus fruit products if any part thereof come from outside the state,[1] the effect of the facial application of the rule to out-of-state grapefruit is readily apparent.

However, Respondent has made a statement to this court concerning the application of the rule which we consider binding; that the rule applies *only* to processed 100% grapefruit products packed in retail containers in Florida which are derived *entirely* from grapefruit grown in Florida. We have proceeded to assess the validity of the rule on that basis.

Petitioners argue that, notwithstanding the restricted application of the rule, the rule cannot withstand their challenge on statutory and constitutional grounds. That challenge and Respondent's defense require a modern-day examination of a 44 year old legislative directive that Respondent advertise Florida citrus fruit. Respondent recognizes that its authority to promulgate the rule in question is not expressly conferred by any applicable statute, but it asserts that such authority is derived from its express duty to advertise and promote the sale of Florida citrus fruit.[2]

Respondent's concern is that the supply of Florida grapefruit is expected to increase twice as fast as demand. An increase in the consumption of grapefruit products

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[1] § 601.98, Fla. Stat. (1977).

[2] The statutory definition of "citrus fruit" includes processed citrus products containing 20 percent or more citrus fruit or citrus fruit juice. § 601.03(7), Fla. Stat. (Supp. 1978).

must, therefore, be an overall goal of Respondent's grapefruit advertising efforts. Petitioners agree that there will be an oversupply of grapefruit, and state that "[t]he desire for substantial increase in sales demand is a common goal that is strongly held by Petitioners and Respondent alike."

Respondent, however, has a further concern; it points to the fact that one-half of the anticipated significant increase in the growth of grapefruit by the 1979-80 season will be in citrus-producing areas other than Florida, so that there will be an ever-increasing competitiveness from these non-Florida areas in the marketplace. Respondent says, in effect, that there is no way it can carry out the duties placed upon it by the legislature to advertise Florida citrus unless Florida citrus is identified to the consumer; that when Florida grapefruit is advertised but the product in the marketplace is not identified, Respondent is not advertising Florida grapefruit, but grapefruit from California, Arizona, Texas, Brazil and other citrus-producing areas that compete with Florida in the marketplace. Therefore, according to Respondent, the rule in question is necessary and proper for the performance of Respondent's duty to advertise Florida citrus, which is the pursuit of a legitimate legislative objective.

Petitioners argue that authority to compel a designation of Florida origin on Florida grapefruit products packed by them is not implied by Respondent's duty to conduct advertising; but if that power is so implied, the legislature has unlawfully delegated legislative power to Respondent. Furthermore, say Petitioners, the rule violates the commerce clause of the United States Constitution and the guarantees of due process of law and free-

dom of speech contained in both the United States and Florida Constitutions. In presenting these challenges, Petitioners do not make an issue of the rule's definition of "prominent," nor do they complain of the cost to them of complying with the rule.

For the reasons hereinafter expressed, we reject Petitioners' arguments and hold that Respondent's Rule 20-66.04 is valid.

STATUTORY AUTHORITY

The statutory scheme for regulation of the Florida citrus industry was first established by the legislature in 1935 and has remained basically unchanged since then. In that year several legislative acts were passed which were designed to regulate the production and marketing of citrus fruit. Chapters 16854 through 16862, Laws of Florida (1935). The first of these, Chapter 16854, established Respondent under the name "Florida Citrus Commission" and made it a corporate body. Respondent was charged with the duty of carrying out all the provisions and requirements of Chapter 16854. To defray its expenses, an excise tax was levied and made payable to Respondent by persons selling or offering citrus fruit for sale or shipment in Florida.

Basically, Chapter 16854 called for the inspection and grading of citrus fruit, and Respondent was given extensive specific power and authority to accomplish the purpose of the act. Additionally, Respondent was empowered to "adopt and from time to time alter, rescind, modify and/or amend all proper and necessary rules, regulations and orders for the exercise of its powers and the performance of its duties under this act and to act as the general supervisory authority over the administration and

enforcement of this act and the provisions thereof and to exercise such other powers and perform such other duties as may be imposed upon it by other laws of the State of Florida."

Among the reasons for the passage of Chapter 16854, as expressed in the act, were the following:

> In the exercise of the police power of the state to protect the public health and welfare and to stabilize and protect the citrus industry of the State of Florida. Because the citrus fruit crop grown in Florida comprises the major agricultural crop of Florida and the business of disposing of such crop is of public interest. Because it is wise, necessary and expedient to protect and enhance the quality and reputation of Florida citrus fruit in domestic and foreign markets.
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> Because said act is designed to promote the general welfare of the Florida citrus fruit industry, which in turn will promote the general welfare of the State of Florida.

Chapters 16856 through 16858, Laws of Florida (1935) established the "orange advertising fund," the "grapefruit advertising fund" and the "tangerine advertising fund," respectively. Each act imposed an excise tax payable to Respondent by the person first handling the particular citrus fruit in the primary channel of trade. The only difference in these laws was in the amount of the respective taxes.

Chapter 16857, establishing the grapefruit advertising fund, stated that its purpose was to promote the sale of grapefruit produced in Florida through the conducting of an advertising campaign. The reasons for the passage

of the act were stated to be that economic waste was being fostered in the citrus industry of the state by the lack of proper advertising and dissemination of information necessary for the development and promotion of the sale of grapefruit grown in Florida; that this created an adverse economic impact on all citizens of the state; that in the interest of the public welfare and general prosperity of the state, such deplorable and unnecessary loss could and should be eliminated by acquainting the general public with the health-giving qualities and the food and/or dietetic value of the different grades of grapefruit grown in Florida. The act expressly stated that it was designed "to promote the general welfare of the Florida citrus fruit industry, which in turn will promote the general welfare of the State of Florida."

Chapter 16857 charged Respondent with the duty to plan and conduct a campaign for commodity advertising, publicity, and sales promotion to increase the consumption of grapefruit. As defined in the act, the word "grapefruit" meant grapefruit grown in the State of Florida. Respondent was also given the duty to decide upon some distinctive and suggestive tradename and to promote its use in all ways to advertise Florida citrus fruit.

After imposing an excise tax to fund the grapefruit advertising fund, the act provided that all monies collected by Respondent under the act over and above necessary administrative expenses "shall be spent exclusively for the advertising of [Florida] grapefruit as herein provided." Respondent was empowered to adopt, and from time to time alter, rescind, modify and/or amend all proper and necessary rules, regulations and orders for the exercise of its powers and the performance of its duties under the act. Finally, the act provided that it

was to be liberally construed. In 1937, the legislature replaced the 1935 act with Chapter 17780, Laws of Florida (1937), which added provisions not pertinent here.

In 1941 the Florida legislature adopted and enacted a compilation and revision of the laws of general application of Florida, designated as Florida Statutes (1941). The three laws establishing the orange advertising fund, the grapefruit advertising fund, and the tangerine advertising fund, were consolidated by the revisors and placed in Chapter 599, Florida Statutes (1941), entitled "Citrus Advertising." Other citrus laws were set forth in separate chapters. Section 599.02, headed "Necessity for Citrus Advertising" stated the following:

> When proper advertising and dissemination of information necessary for the development and promotion of the sale of citrus fruits *grown in this state* is not made, economic waste is fostered in the citrus industry and chaotic conditions are created in said industry, that imperil the ability of producers to contribute in appropriate amounts to the support of ordinary governmental and educational functions of the state, thus tending to increase the tax burdens of other citizens for the same purposes. Such unavoidable and unnecessary loss may be eliminated by acquainting the general public with the health-giving qualities and the food and dietetic values of the different kinds and grades of citrus fruit *grown in this state,* and in the interest of the public welfare and general prosperity of the state should be. (emphasis added).

Again it was provided that monies going into the grapefruit advertising fund, after payment of expenses, were to

be used exclusively for the advertising of Florida grapefruit.

In 1949 all of Florida's citrus laws were consolidated and enacted as the "Florida Citrus Code of 1949" (the Code), which, as subsequently amended, is set forth in Chapter 601, Florida Statutes (1977) and Florida Statutes (Supp. 1978). In 1969 Respondent was renamed the State of Florida Department of Citrus and the Florida Citrus Commission was made its head. Respondent occupies a unique position in Florida government in that it receives no funds from the general revenue of the state, but operates solely and exclusively from excise taxes which are collected by Respondent from handlers of citrus fruit in Florida.[3]

Section 601.02 expresses the fact that the Code was enacted in the exercise of the police power of the state. This section further states that the planting, growing, cultivating, etc. of the Florida citrus crop and the harvesting, processing, etc. of that crop, together with the sale and distribution of that crop, affect the health, morals and general economy of a vast number of citizens of the state who are either directly or indirectly dependent thereon for a livelihood, and said business is, therefore, of vast public interest.

In Section 601.15, the Code retains the original 1935 directive that Respondent plan and conduct a campaign for commodity advertising, publicity, and sales promotion to increase the consumption of citrus fruit and to decide upon

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[3] "Handler" is defined as any person engaged within Florida in the business of distributing citrus fruit in the primary channel of trade or any person engaged as a processor in the business of processing citrus fruit. § 601.03(23), Fla. Stat. (1977). The excise taxes imposed under Chapter 601 are payable at the time citrus fruit is first handled in the primary channel of trade. §§ 601.156 and 601.157, Fla. Stat. (1977); §§ 601.15(6)(a), 601.154, 601.155, and 601.158, Fla. Stat. (Supp. 1978).

some distinctive and suggestive tradename and promote its use in all ways to advertise Florida citrus fruit. Excise taxes are imposed to provide moneys for the Florida Citrus Advertising Trust Fund, which is appropriated by the statute to Respondent's use.[4] Portions of that fund are devoted to citrus research, transportation studies, a reserve fund for advertising of oranges, and payment of administration expenses. The balance must be used exclusively for the advertisement of citrus fruits, either in fresh or processed form, produced in the state.[5]

Section 601.10 expresses the powers of Respondent, the first of which is "to adopt and, from time to time, alter, rescind, modify, or amend all proper and necessary rules, regulations, and orders for the exercise of its powers in the performance of its duties under this chapter and other statutes of the state." That power is repeated in Section 601.15(10)(a), pertaining to Respondent's advertising campaign.

The question whether Respondent has statutory authority to adopt Rule 20-66.04 boils down to the question whether that rule is "proper and necessary" for the performance of Respondent's duty to advertise Florida citrus fruit. We believe it is. We accept Respondent's conclusion that, whereas identification of Florida origin might not have been deemed necessary in previous years, it is now made necessary by the anticipated increased competition from non-Florida grapefruit-producing areas. We agree that the

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[4] Excise taxes imposed under other sections of Chapter 601 are paid into the trust fund and earmarked for special purposes. E.g., § 601.152, Fla. Stat. (Supp. 1978).

[5] § 601.15(7)(f), Fla. Stat. (Supp. 1978). Under certain circumstances, up to 10% of the advertising fund may be expended for noncommodity advertising, merchandising, publicity, and sales promotion, including brand advertising rebate programs.

rule is an appropriate means of achieving that identification in the marketplace. It is significant, we think, that the legislature's directive to advertise, from the time it was originally issued in 1935 to date, has been to advertise not just grapefruit, but *Florida* grapefruit. Taking into consideration the extensive regulatory powers of Respondent with respect to the citrus industry and the importance of that industry to the State of Florida, we believe the legislature has given Respondent the implied power to require Florida identification of Florida grapefruit products.

In their argument to the contrary, Petitioners point to Section 601.11 of the Code, which specifically mentions the power of Respondent to prescribe rules and regulations governing the marking, branding, labeling, tagging or stamping of citrus fruit or products thereof for the purpose of showing the name and address of the person marketing such citrus fruit or products thereof and the grade, quality, variety, type, or size of the citrus fruit, or the grade, quality, variety, type, and amount of the products. Petitioners argue that Section 601.11 shows a clear legislative intent to limit Respondent's authority over labeling to the matters expressly stated in that section.

We do not agree. Section 601.11 gives Respondent broad power to establish state grades and minimum maturity and quality for citrus fruits and products thereof. The specific mention of the power to prescribe rules or regulations for the marking, branding, labeling, etc. of citrus fruit or products thereof to reflect grade and quality does not, in our view, clearly indicate a legislative intent that Respondent can enact requirements as to marking and labeling only in that particular area. On the contrary, we believe Section 601.11 shows that the legislature considered jurisdiction of

Respondent over marking and labeling to be appropriate when necessary to carry out a legislative purpose.

Petitioners argue also that Florida legislative history demonstrates that the legislature has expressly rejected compulsory declaration of Florida origin on Florida citrus and citrus products. In 1937 the legislature enacted, and in 1939 the legislature repealed, a law compelling declaration of Florida origin on any container of canned citrus fruit or citrus juice produced or grown in the State of Florida and prohibiting the use of any container bearing the word "Florida" for citrus fruit or citrus juice produced or grown outside the state. The 1937 law, Chapter 17783, Laws of Florida (1937), stated in a preamble the evil perceived by the legislature to which the law was directed. This was that certain persons in the state had theretofore engaged in the practice of importing into the state citrus fruit and citrus juice produced and canned in other states and countries and labeling the same in the State of Florida and selling the same in and from the State of Florida, thereby leading the dealers in such canned citrus fruit and citrus juice to believe that such citrus fruit and citrus juice was produced in the State of Florida, to the injury and detriment of producers and canners of citrus fruits and citrus juice in the state.

In 1939 the legislature abandoned the approach of the 1937 law by repealing it and replacing it with a simple prohibition against shipping citrus fruit or citrus juice from the State of Florida which is grown in any other state in such manner as to indicate in any form whatsoever that such citrus fruit or citrus juice was produced and canned in the State of Florida. That law is reflected today in Section 601.98 of the Florida Citrus Code.

In 1939, also, the legislature ventured into the area of establishing a tradename by enacting Chapter 19477, which set forth specific standards for citrus fruit and citrus fruit products and the containers thereof, and then provided that any person who canned Florida-grown citrus products packed to standard as set forth in the act was permitted to stamp or emboss on the top or bottom of the container the word "Floridabest" or show the word "Floridabest" on the label. The method and manner of marking labels and stamping or embossing containers, including the size and type of lettering, was to be provided in rules promulgated by Respondent. Chapter 19477, Florida Statutes (1939). This act also repealed Chapter 17783, Laws of Florida (1937) "and any or all other laws in conflict herewith."

As shown above, and as pointed out by Petitioners, all of the basic provisions of today's Florida Citrus Code were in existence in 1937. Therefore, Petitioners argue, if the legislature considered the existing laws to authorize Respondent to compel the use of Florida identification on product containers, there would have been no need to enact Chapter 17783 in 1937.

Respondent replies that in enacting Chapter 17783, the legislature was not speaking to the area of advertising, but to the misleading practice of importing non-Florida citrus into the state and then shipping it out in such a form, including labeling, as to indicate that it was Florida citrus or citrus products. Respondent argues that the legislature had in mind a specific matter of great importance and simply stepped into the area of citrus regulation by the exercise of a power held by the legislature concurrently with Respondent.

Respondent further argues that it is reasonable to assume that the legislature may have deemed it unwise to

require designation of origin across the board on all citrus fruit or citrus products shipped out of the state. It cannot be concluded, says Respondent, that the actions of the legislature in 1937 and 1939 with regard to designation of Florida origin meant, first, that only the legislature had the power to require such designation, or, second, that the legislature expressly found it unwise ever to require such designation. We agree with Respondent that the legislature intended simply to leave the matter in Respondent's hands.

The legislative effort begun in 1939 to promote the use of the word "Floridabest" was abandoned in 1949 when the Florida Citrus Code was enacted. The Code simply retains the provision, originally enacted in 1935, that Respondent is to decide upon some distinctive and suggestive tradename and to promote its use in all ways to advertise Florida citrus fruit. Again, we believe that the legislature simply stepped into a field already occupied by Respondent and then stepped out, leaving the matter again in the hands of Respondent.

Invalid Delegation of Legislative Power

The fundamental principle that legislative power may not be delegated to an administrative agency is more firmly embedded in Florida law than in the law of some other jurisdictions. *Askew* v. *Cross Key Waterways*, 372 So.2d 913 (Fla. 1978). The present Florida constitution, as did its predecessors, specifically provides that no person belonging to one branch of state government shall exercise any powers appertaining to either of the other branches unless expressly provided in the constitution. Article II, Section 3, Florida Constitution. The legislative power of the state is vested in the legislature of the State of Florida. Article III, Section 1, Florida Constitution.

Petitioners state the rule to be that when the legislature delegates powers to an administrative agency, it must announce adequate standards to guide the agency in the execution of the powers delegated. Petitioners argue that, assuming the legislature impliedly granted to Respondent the power to require designation of Florida origin with respect to Florida citrus and citrus products, that grant is an unlawful delegation of legislative power because there are no guidelines set forth in the Florida Citrus Code to prevent the entrusting of that responsibility from becoming an abdication of the legislature's lawmaking responsibility.

Petitioners parade a list of horribles which might result from what Petitioners contend is the unrestrained implied power of Respondent in this area. Petitioners suggest that there is nothing to prevent Respondent from deciding in the future to compel the use of a single Respondent-dictated industry-wide tradename as the required form of identification on all processed grapefruit products, or a Respondent-dictated identification to be of equal or greater prominence than Petitioners' own private brand names, or a direction by Respondent compelling Petitioners to abandon the use of their own private brand names and rely exclusively on a Respondent-dictated form of identification for Petitioners' grapefruit products.

In support of their position, Petitioners have cited to us several recent decisions of our supreme court finding an unlawful delegation of legislative power because of the absence of adequate guidelines. *E.g., Askew* v. *Cross Key Waterways, supra; Harrington & Co., Inc.* v. *Tampa Port Auth.*, 358 So.2d 168 (Fla. 1978). But the cases cited by Petitioners deal with discretionary powers given to administrative agencies to issue licenses, permits, approvals, or designations. That is not the situation here.

The Florida Supreme Court early recognized the constitutionality of statutory provisions authorizing administrative agencies to formulate rules and regulations to make a statute effective for the public purposes designed. *State* v. *Atlantic Coastline R. Co.*, 56 Fla. 617, 47 So. 969 (1908). In a later case, the supreme court held that in order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to a legislative department, and the conferring of it is not warranted by the provisions of the constitution. *Bailey* v. *Van Pelt*, 78 Fla. 337, 82 So. 789 (1919). In that case the court stated:

> The legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. This principle of the law is peculiarly applicable to regulations under the police power, since the complex and ever-changing conditions that attend and affect such matters make it impracticable for the legislature to prescribe all necessary rules and regulations.
>
> Authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated

> limitations, is not an exclusively legislative power. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all the departments.
>
> The exercise of some authority, discretion, or judgment may be incident or necessary to the performance of administrative or ministerial duties; but such authority, discretion, or judgment is subject to judicial review; and it is not among the powers of government that the constitution separates into departments.

Id. at 793.

Thus the mere granting of authority to Respondent to make rules and regulations does not alone constitute an unlawful delegation of legislative power. The limitations mentioned by the court in *Bailey* v. *Van Pelt, supra,* can be found in the requirement that Respondent's rules and regulations be proper and necessary to the exercise of Respondent's powers and the performance of Respondent's duties for the accomplishment of a clearly stated legislative objective. And finally, any rule or regulation enacted by Respondent is subject to judicial review.

In *Arnold* v. *State,* 140 Fla. 610, 190 So. 543 (1939), the Florida Supreme Court considered a law which provided for the establishment and support of a system of public free schools in Florida, and gave the State Board of Education authority to promulgate rules and regulations to effect such a system. In rejecting a challenge to one such rule, the court said that it and other rules promulgated under the act, so long as they were shown to conform to the general purpose of the act, would not be held to be in violation of the separation of power provisions of the con-

stitution. The court said that the test of validity in a case of this kind is whether or not the act defines a pattern by which the rule or regulation must be made to conform. The court held that since the rule in question went to the establishment and support of the public free school system, it was within the purview of the act.

The expressed legislative intent of the Florida Citrus Code with respect to advertising is that Florida citrus fruit be advertised, that Respondent plan and promote an advertising campaign for that purpose, and that Respondent enact any rule proper and necessary to the performance of that duty. This legislative framework provides an adequate basis for determining whether, in promulgating a rule requiring a form of designation on Florida citrus products, Respondent is carrying out the intent of the legislature. We conclude that the legislature has not unconstitutionally delegated legislative power to Respondent by empowering Respondent to adopt such a rule.

Due Process of Law

Both the 14th Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution prohibit the taking of property without due process of law. We consider the federal and Florida constitutional guarantees as imposing the same standard and will discuss them as one. *Florida High School Activities Association* v. *Bradshaw*, 369 So.2d 398 (Fla.2d DCA, 1978).

There is no question that Petitioners have constitutionally protected property rights in the value of their private brands. For example, Petitioner Coca-Cola Company, through its Minute Maid Division, has expended

millions of dollars in establishing the Minute Maid brand. Coca-Cola regards the Minute Maid label as the second most valuable property owned by it, preceded only by the Coca-Cola label itself. But property rights are not absolute; they are held subject to the state's police power and the constitutional guarantee of due process will not intercept the regular and lawful exercise of that power. *Mayo* v. *Polk Co.*, 124 Fla. 534, 169 So. 41 (1936); *appeal dismissed*, 299 U.S. 507, 57 S.Ct. 39, 81 L.Ed 376 (1936). The issue here is whether Rule 20-66.04 constitutes a valid exercise of the police power of the State of Florida.

A federal court has recently recognized that the police power doctrine under the Florida constitution is very similar to the doctrine of substantive due process under the Federal constitution. First, the exercise by a state of its inherent police power must be in the interest of achieving a public purpose, such as health, safety, morals, or general welfare of the public. Second, the specific form of police power chosen must be reasonably related to that public purpose. *Patch Enterprises, Inc.* v. *McCall*, 447 F.Supp. 1075 (M.D.Fla. 1978).

The parties here lock horns first on the issue whether the purpose of Rule 20-66.04 is legitimate; that is, whether it is a proper purpose for the exercise of the police power of the state. Petitioners argue that the purpose of the rule is to benefit the general economy of the Florida citrus industry and that this is not a proper subject for the exercise of the state's police power, citing *Florida Citrus Commission* v. *Hi-Acres Concentrate, Inc.*, 227 So.2d 707 (Fla. 4th DCA 1969), *cert. denied*, 241 So.2d 859 (Fla. 1970). In that case the Fourth District Court of Appeal, in a brief opinion, considered the validity of a rule of

Respondent requiring frozen concentrated citrus juice containers to have "easy open" tops. The court observed that the purpose of the regulation was to improve the quality of containers used in the citrus industry, thereby selling more citrus juice and thus protecting and promoting the general economic welfare of the Florida citrus industry. The court held that economic benefit to the industry alone is not a valid basis on which the regulation could be justified. We disagree with that statement.

The regulation of the Florida citrus industry in the exercise of the state's police power has been upheld many times. *E.g., Sligh* v. *Kirkwood,* 237 U.S. 52, 35 S.Ct. 501, 59 L.Ed. 835 (1915); *L. Maxcy, Inc.* v. *Mayo,* 103 Fla. 552, 139 So. 121 (1932); *Mayo* v. *Polk Co., supra.* In *Sligh* v. *Kirkwood, supra,* the United States Supreme Court observed that the police power, in its broadest sense, includes all legislation and almost every function of civil government. Most significantly, the court said "[the police power] embraces regulations designed to promote public convenience of the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health."

In that case the Court had under consideration a Florida statute making it unlawful for anyone to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which were immature or otherwise unfit for consumption. The opponents of the statute contended that it was not a legitimate exercise of the police power because it had the effect of protecting the health of people in other states who might receive fruits from Florida in a condition unfit for consumption and, however commendable it may be to protect the health of such foreign peoples, that purpose is not within a state's police power. In upholding the statute, the

Court said, in effect, that economic benefits are a legitimate purpose for the exercise of a state's police power:

> We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in foreign markets, with the consequent beneficial effects upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.

237 U.S. at 61, 35 S.Ct. at 503, 59 L.Ed. at 839.

Not long ago the United States Court of Appeals for the Fifth Circuit specifically held that economic benefit to a local industry is a permissible objective for the exercise of a state's police power. *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970). In that case the court upheld a Dade County, Florida, ordinance prohibiting commercial advertising signs within 200′ of any expressway right-of-way and providing for the regulation of such signs within 600′ of the right-of-way. The court was of the opinion that various aesthetic considerations would justify such an ordinance, but it observed that the purpose was also to maintain and increase the attrac-

tiveness of the area to tourists, and thus influence the economic prosperity of the county. The court said "[t]here can be no doubt but that these objectives are constitutionally permissible under the police power of the State of Florida." It observed that the importance of the tourist industry to Dade County tended to make the ordinance reasonable in the economic sense because of the commercial benefits hoped to be realized from beautification.

In *John Donnelly & Sons* v. *Mallar*, 453 F.Supp. 1272 (D.Maine 1978), the court had under consideration a statute of the State of Maine which eliminated all off-premises outdoor billboard advertising in the state. In upholding that statute, the court recognized that the act was intended to preserve the state scenic beauties not only for their aesthetic value but because a visual attractiveness of the state substantially promotes tourism, one of the state's major industries, as well as its general economic and cultural development. The court said "[t]he promotion of tourism manifestly is a valid legislative objective."

The Florida Supreme Court had an early opportunity to consider the value to the Florida citrus industry of advertising Florida citrus fruit. *C. V. Floyd Fruit Co.* v. *Florida Citrus Commission*, 128 Fla. 565, 175 So. 248 (1937). In that case the excise taxes levied by the three 1935 legislative enactments establishing the orange, grapefruit, and tangerine advertising funds were attacked on the ground that the purpose of the tax was not a public purpose. The court held that it was, saying "it cannot be reasonably contended that the protection and promotion of the citrus industry in Florida is not a matter of public concern or that the legislature may not determine within reasonable bounds what is necessary for the protection and expedient for the promotion of that industry. We are committed to the

theory that advertising is a proper method for promoting the public welfare and that, therefore, the tax levied to provide funds for advertising serves a public end."

We have no difficulty in concluding that the advertising purpose of Rule 20-66.04, economic in nature, is a valid objective for the exercise of the police power of the State of Florida.

The next inquiry is whether the rule is reasonably related to the achievement of the legislative objective. In arguing that it is not, Petitioners cite *State* v. *Leone,* 118 So.2d 781 (Fla. 1960), for the proposition that if there is a choice of ways in which government can reasonably attain a valid goal necessary to the public interest, it must elect that course which will infringe the least on the rights of the individual. Petitioners argue that the legislative objective of advertising Florida citrus fruit can be accomplished simply by relying on the working of the free enterprise system. Petitioners say that it is axiomatic under the free enterprise system that each brand owner will choose, without outside compulsion, to adopt a marketing strategy which he concludes will more effectively increase his sales than other strategies; accordingly, each brand owner who concludes that sales of his brand will be so increased will place Florida identification on his brand label. Therefore, Petitioners argue, there is no necessity for the compulsion of Rule 20-66.04.

First of all, we observe that the choice of least infringement required under the principle enunciated in *State* v. *Leone* is a choice between or among possible regulatory devices. The principle was not meant to require a choice between regulation or nonregulation. Obviously, nonregulation will always be the choice that will infringe the least on the rights of the individual.

Secondly, although we share Petitioners' faith in the free enterprise system, we are not persuaded that the legislative purpose can be achieved by relying solely on laissez faire. Throughout their arguments to this court, Petitioners repeat over and over that their interests and that of Respondent are the same; that is, to sell more grapefruit products. That is not entirely true; Petitioners are interested in selling grapefruit products, including Florida grapefruit products, while Respondent is interested exclusively in selling Florida grapefruit products. Since 1935, the Florida legislature has determined that it is necessary for the state to supplement private brand advertising of its citrus fruit. It is for this reason that the legislature charged Respondent with the duty to conduct advertising of Florida citrus and imposed a tax to defray the cost.

There is a third consideration. While Petitioners invariably speak of the rule's labeling requirement and its interference with their private brand labels, it is important to note that the rule does not require that designation of Florida origin be placed on a label; it clearly permits such designation to be printed or embossed on the container end. We think Petitioners' argument of unreasonable infringement fails in the face of this alternative means of designation permitted by the rule.

On the whole, we believe that the rule is reasonably related to a legitimate legislative purpose. Respondent has determined that in the face of increasing competition from other grapefruit-producing areas in the marketplace, identification of Florida products is necessary for Respondent's advertising to be effective. We cannot quarrel with that conclusion. It is true that Respondent has not cited, nor have we found, a single case from any jurisdiction addressing the question whether a mandatory declaration of state

origin on a state product for solely economic purposes is a valid exercise of the state's police power. We feel confident in answering that question in the affirmative in this case.

THE COMMERCE CLAUSE

The third clause of Section 8, Article I, of the United States Constitution, provides that the congress shall have power "to regulate commerce . . . among the several states . . ." The United States Supreme Court has long held that, although congress has the exclusive power to regulate interstate commerce, there may be legitimate action by a state in the matter of local regulations, in the exercise of the state's police power, which the state may take until congress exercises its authority upon the subject. *Sligh* v. *Kirkwood, supra.* Therefore, state legislation designed to serve legitimate state interests and applied without discrimination against interstate commerce does not violate the commerce clause even though it affects commerce. What the states may not do is erect barriers to the free flow of interstate commerce. *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978).

In determining whether the impact of state regulation upon interstate commerce is permissible or impermissible, the Supreme Court has considered the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce. *Raymond Motor Transportation, Inc.* v. *Rice, supra.*

In the instant case, we have already held that Rule 20-66.04 is a valid exercise of the police power of the State of Florida. Therefore, the question here is whether the rule

discriminates against interstate commerce or places a burden on interstate commerce which outweighs the legitimate state concern.

In support of their contention that the rule is invalid under the commerce clause, Petitioners have cited to us several cases in which the Supreme Court has found violations of the commerce clause, but all are clearly distinguishable from the instant case. We will mention two.

In *Pike* v. *Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), the Court found invalid a provision of the Arizona Fruit and Vegetable Standardization Act which required that all cantaloupes grown in Arizona and offered for sale must be packed in certain specified standard containers approved by the official charged with enforcing the Arizona law. The law was challenged by a company which grew cantaloupes of exceptionally high quality in Arizona and then transported them to its facilities in Blythe, California, for packing and processing. The practical effect of the law would have been to compel the company to build packing facilities in Arizona, which would have been time-consuming and costly, and in the meantime, the company stood to lose a considerable amount of money invested in its current cantaloupe crop. The Court had no difficulty in finding that this was an unconstitutional burden on interstate commerce. In doing so, it observed that Arizona's interest was in requiring that interstate cantaloupe purchasers be informed that the company's high quality fruit was grown in Arizona, and the court said that this asserted state interest was a legitimate one. But the court said that the commerce clause cannot permit a state to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

The second case cited by Petitioners is *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). That case involved a statute enacted by the State of North Carolina which required that all closed containers of apples sold, offered for sale, or shipped into the state bear no grade other than the applicable U.S. grade or standard. The law was challenged by the Washington State Apple Advertising Commission on the ground that the effect of the law was to prohibit the display of Washington State apples grades brought into North Carolina. Washington law required all apples shipped in interstate commerce to be tested under strict quality standards and graded accordingly. The court noted that the Washington State grades, which had gained substantial acceptance in the trade, were the equivalent of, or superior to, the comparable U.S. grades and standards. The question was whether the North Carolina law violated the commerce clause insofar as it prohibited the display of Washington State grades on closed containers of apples shipped into the state from Washington. Finding a violation, the Court said that the challenged statute had the practical effect of not only burdening interstate sales of Washington apples, but also of discriminating against them.

Rule 20-66.04 will have no effect on interstate commerce of the kind found in the *Bruce Church* and *Washington Apples* cases. Petitioners have not suggested to us that their importation of out-of-state grapefruit into the State of Florida will be altered in any way by reason of the rule's application (restricted as stated at the beginning of this opinion). They have not suggested that they will be required to invest in new plant facilities or alter existing ones, or indeed that their operations will be changed in any

manner whatsoever. Although Petitioners assert that the rule discriminates against and places an unconstitutional burden on interstate commerce, they have failed to articulate just what that discrimination or burden is. This court sees no effect of the rule on the importation of grapefruit into this state, or the export of grapefruit products from this state, nor are we persuaded that the rule is intended to have any such effect.

Therefore, we hold that Rule 20-66.04 is not invalid by reason of the commerce clause of the United States Constitution.

Freedom of Speech

Freedom of speech is guaranteed by the 1st Amendment to the United States Constitution and in Article I, Section 4, of the Florida Constitution. The 1st Amendment to the United States Constitution applies to the states under the 14th. *Gitlow* v. *New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). We have first considered whether the guarantee contained in the Florida Constitution is any broader than that contained in the United States Constitution. We have found no case in Florida answering that question. We agree with the observation that Florida courts tend to merge the two limitations to the point that federal and state cases are cited interchangeably.[6] Under the circumstances, and in the absence of any expression by our Supreme Court that the Florida guarantee is broader in scope than the federal, we conclude that the two are the same and will not treat them separately.

Petitioners first propose that commercial and promotional speech is constitutionally protected under the free-

[6] Alloway and Knight, *Trends in Florida Constitutional Law*, 16 U. Miami L. Rev. 685, 698 (1961).

dom of speech guarantee. Respondent does not dispute that, nor do we. The United States Supreme Court so held in *Bigelow* v. *Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600 (1975). The Court expressly rejected the notion, previously held in some quarters, that expression concerning purely commercial transactions is wholly outside the protection of the 1st Amendment.

Petitioners argue that their commercial speech—that is, the promotional statements on their labels—is infringed by Rule 20-66.04 in two respects. First, Petitioners say that their labels will be demeaned because Respondent's advertising will cause consumers to conclude that all grapefruit from Florida is of substantially equal quality, so that Petitioners' brands of products of higher quality will be reduced to the level of the brand of lowest quality in the marketplace. Petitioners say that a significant portion of grapefruit products on which the declaration of origin will appear is of substantially lower quality than theirs.

Secondly, Petitioners claim that the rule will impose a message on their advertising which they do not wish to convey, in that consumers may be reminded of images associated with Florida or with Respondent's advertising that are "ideologically sensitive." Petitioners say that Respondent is forcing Petitioners' private property to become an expression of points of view made by or associated with Respondent's advertising, a function Petitioners do not want to perform and which they believe will be harmful to the extensive efforts of each to distinguish and promote its own brand of grapefruit products. Petitioners, however, have cited to us no example in the record of an unfavorable image associated with Respondent's advertising or with the State of Florida.

Again we note that the rule does not require that designation of Florida origin appear on Petitioners' labels. Alternatively, it may appear on the container end. As far as Petitioners' labels are concerned, we are not persuaded that the association of Petitioners' brand names with grapefruit products inferior to theirs will be made significantly greater by the description of Petitioners' products as "Florida grapefruit" rather than merely as "grapefruit." It seems to us that Petitioners' argument in this respect relates to a matter of competition; whereas, Petitioners' brand names now compete with other brand names in the marketplace on the basis that all offer "grapefruit" products to the consumer for selection, the rule will require that competition be based on an offering of "Florida grapefruit" products. It seems to us that Petitioners can compete as well for the Florida grapefruit products market as they have competed in the past for the grapefruit products market. Florida law provides minimum quality standards for food products of citrus fruits. § 601.11, Florida Statutes (1977); Florida Administrative Code, Chapter 20-64.

The more serious point, we believe, is that Petitioners will be compelled to carry the images associated with Respondent's advertising campaign, good or bad. In this sense there is no question but that the rule relates to the content of Petitioners' commercial message. In arguing that the guarantee of freedom of speech is violated by the rule's compulsion, Petitioners have cited to us *Wooley* v. *Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). In that case the United States Supreme Court upheld a challenge by followers of the Jehovah's Witnesses' faith to a New Hampshire statute requiring automobiles to carry license plates embossed with the state motto "Live free or die." The court said that "[t]he New Hampshire statute

in effect requires that appellees use their private property as a mobile billboard for the state's ideological message—or suffer a penalty." In this case Petitioners argue that in the very same manner, Respondent is forcing Petitioners' private property to become "mobile billboards" for points of view made by or associated with Respondent's advertising. Petitioners argue that, under the authority of *Wooley* v. *Maynard,* this court should find an infringement of Petitioners' freedom of commercial speech.

But *Wooley* v. *Maynard* dealt with an infringement of personal-noncommercial speech. The protection afforded commercial speech under the 1st Amendment is not commensurate with that afforded personal speech. The Supreme Court recently pointed out that it has not discarded the distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. The Court said that commercial speech is afforded a limited measure of protection, commensurate with its subordinate position in the scale of 1st Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

The content of commercial speech is indeed regulated extensively in this country, both in terms of matters prohibited and in terms of information required to be shown. For example, Section 500.11, Florida Statutes (1977), requires specific information on labels of all food products. The Florida Citrus Code directs Respondents to prescribe rules and regulations governing labeling for the purpose of showing specified information. The validity of regula-

tions pertaining to the content of commercial speech has been traditionally tested on due process and commerce clause grounds, not on 1st Amendment guarantees of freedom of speech.

Unlike the case of personal speech, it is not necessary to show a compelling state interest in order to justify infringement of commercial speech through regulation. It is true, as Petitioners point out, that the court in *Anderson, Clayton & Co.* v. *Washington State Department of Agriculture,* 402 F.Supp. 1253 (W.D. Wash. 1975) spoke of the necessity of showing a compelling state interest in this area. We believe the court in that case was under the erroneous impression that the Supreme Court had placed commercial speech in the same category as noncommercial speech for 1st Amendment purposes, an intention which the Court later disavowed in *Ohralik* v. *Ohio State Bar Association, supra.*

Reverting to the language of the Supere Court's opinion in *Bigelow* v. *Virginia, supra,* we believe the Court has simply said that there is a 1st Amendment interest at stake in commercial speech and that interest must be weighed against the public interest allegedly served by the regulation.[7] Accordingly, we have engaged in the task of balancing the interests at stake in this case and have concluded that Petitioners' 1st Amendment interests are not so great as to outweigh the public's interest sought to be served by Respondent's Rule 20-66.04. Accordingly, we hold that the rule does not violate the federal and Florida guarantees of freedom of speech.

---

[7] The balancing test of the *Bigelow* case is discussed in a comment on that case at 28 U. Fla. L. Rev. 610 (1976).

OTHER POINTS

Petitioners have raised two other points that we will treat briefly. The first of these is that there is not competent substantial evidence in the record to support Respondent's decision to adopt Rule 20-66.04. Petitioners' argument in this respect amounts to an attack on the wisdom of the rule. They argue that there is no proof that the rule will accomplish the legislative objective. Further, they point to testimony of their advertising expert that designation of Florida origin on grapefruit products is undesirable and may have an adverse effect on sales.

But, obviously, there can be no guarantee of results in any decision on a matter of advertising. An exercise of police power will not be struck down because a law or regulation is unwise, improper, or out of harmony with a particular school of thought. *Williamson* v. *Lee Optical of Okl.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). We feel that the evidence in the record as to the anticipated increase in competition from non-Florida grapefruit is sufficient to justify Respondent's decision to require that Florida grapefruit products be identified in the marketplace. The wisdom of that decision is not a matter of judicial concern.

Finally, Petitioners argue that Respondent failed to comply with Florida's Administrative Procedure Act (Chapter 120) in two respects. They point to Section 120.54(2), Florida Statutes (1977), which requires that all state agencies prepare an economic impact statement prior to the adoption of any new rule. As Respondent points out, however, its notice of proposed rulemaking was published in 1975 and the law then in effect required no economic

impact statement. It was not until 1976, after all testimony had been taken by Respondent in public hearings on the proposed rule, that the legislature enacted the law requiring a statement of economic impact. Respondent also points out that this issue was not raised by Petitioners during Respondent's rulemaking proceedings. We decline to hold the rule invalid because of Respondent's failure to prepare the economic impact statement required by Section 120.54(2).

The other alleged violation urged by Petitioners is that Respondent failed to rule on Petitioners' proposed findings of facts. Petitioners argue that Respondent was required to do this by Section 120.59(2). But that section applies to "orders" and Section 120.52(9) defines an order as a final agency decision which does not have the effect of a rule. Respondent argues, and we agree, that Section 120.59 does not apply to rulemaking.

CONCLUSION

This court finds no ground in this case for setting aside, modifying, remanding, or ordering agency action or ancillary relief. Accordingly, we are required to, and we do, affirm the action of Respondent in adopting Rule 20-66.04. Section 120.68(14), Florida Statutes (1977).

Affirmed.

HOBSON, Acting C.J., and BOARDMAN, J., concur.

APPENDIX D

Order Denying Rehearing

SUPREME COURT OF FLORIDA

Friday, January 8, 1982

Case No. 57,108

DISTRICT COURT OF APPEAL,

2d District—No. 77-1921

COCA-COLA COMPANY, FOOD DIVISION,
POLK COUNTY, FLORIDA, et al.,

Appellants,

v.

STATE OF FLORIDA,
DEPARTMENT OF CITRUS,

Appellee.

Upon consideration of the Motion to Modify or Clarify Opinion and Motion of Appellants for Rehearing filed in the above styled cause,

IT IS ORDERED that said Motions be and the same are hereby denied.

SUNDBERG, C.J., ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., concur

BOYD, J., dissents

Appendix D—Order Denying Rehearing

TC

cc: Hon. William A. Haddad, Clerk
E. Snow Martin, Esquire
J. Hardin Peterson, Esquire
Monterey Campbell, Esquire
MacFarlane, Ferguson, Allison & Kelly
Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd.
J. Edward Thompson, Esquire
Ansley Watson, Jr., Esquire
C. Lee Cook, Jr., Esquire
Alan I. Greene, Esquire
David C. Bogan, Esquire

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: TANYA CARROLL
Deputy Clerk

APPENDIX E

Notice of Appeal

IN THE

SUPREME COURT OF FLORIDA

Case No. 57,108

THE COCA-COLA COMPANY, FOODS DIVISION, POLK COUNTY, FLORIDA, et al.,

Appellants,

VS.

STATE OF FLORIDA, DEPARTMENT OF CITRUS,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Kraft, Inc., an Appellant in this case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Florida entered herein on June 4, 1981, adhered to upon Petition for Rehearing on January 8, 1982, which judgment upheld, as against a challenge under the United States Constitution, Rule 20-66.04 of the Department of Citrus of the State of Florida (Rule 20-66.04, Florida Administrative Code).

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

Ansley Watson, Jr., and
Ted R. Manry, III, of
MacFarlane, Ferguson, Allison
& Kelly
Post Office Box 1531
Tampa, Florida 33601
(813) 223-2411

By: /s/ Ted R. Manry, III
Ted R. Manry, III

Attorneys for Appellant, Kraft, Inc.

Of Counsel:

Floyd Abrams
Dean Ringel
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
(212) 825-0100

Appendix E—Notice of Appeal

CERTIFICATE OF SERVICE

I, TED R. MANRY, III, one of the attorneys for Kraft, Inc., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of March, 1982, I served one (1) copy of the foregoing Notice of Appeal on each of the parties required to be served in accordance with Supreme Court of the United States Rules 10.2, 10.4, 28.3 and 28.5, as follows: On all parties to the action in the Supreme Court of Florida by mailing copies in duly addressed envelopes, with first class postage prepaid, to their following respective attorneys of record:

J. Hardin Peterson, Jr., Esquire
Post Office Drawer BS
Lakeland, Florida 33802
Attorney for Appellee, State of Florida, Department of Citrus

E. Snow Martin, Esquire
Martin & Martin
Post Office Box 117
Lakeland, Florida 33802
Attorney for Appellant, The Coca-Cola Company, Foods Division.

The record in this cause was returned by the Supreme Court of Florida to the District Court of Appeal, Second District, State of Florida, which returned the record to the Department of Citrus, State of Florida. I hereby further certify that, pursuant to Supreme Court of the United States Rule 10.3, a copy of this notice has been filed with the District Court of Appeal of Florida, Second District, Post Office Drawer 327, Lakeland, Florida 33802, and with

the Executive Director, Department of Citrus, State of Florida, Post Office Box 148, Lakeland, Florida 33802.

/s/ Ted R. Manry, III
Ted R. Manry, III, of
MacFarlane, Ferguson, Allison & Kelly
Post Office Box 1531
Tampa, Florida 33601
(813) 223-2411

Attorneys for Appellant, Kraft, Inc.

A True Copy

Attest:

Sid J. White, Clerk
Supreme Court of Florida

by /s/ Dubbie Causseaux
Deputy Clerk

APPENDIX F

Constitutional and Statutory Provisions

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> ". . . no State . . . shall deprive any person of life, liberty, or property, without due process of law. . . ."

DEPARTMENT OF CITRUS
RULE 20-66.04

Florida Identification:

> Effective January 1, 1979, all processed 100% grapefruit products packed in retail containers in Florida shall be prominently identified by use of the word "Florida" or the Florida Sunshine Tree registered certification mark (U.S. Reg. No. 941,773) as described in, and authorized by, Department of Citrus Rule 20-94, including the surrounding phrase "A Product of the Florida Sunshine Tree." To be prominent, when placed on the label, the word "Florida" or the certification mark shall be clearly legible, appear at least one time in a conspicuous location and be in a size and contrasting color so as to be readily seen under general conditions of purchase. To be prominent, when printed or embossed on the container end, the word "Florida" or the certification mark shall be clearly legible, be in a conspicuous size and, if printed, be in a contrasting

color, so as to be readily seen under general conditions of purchase.

FLORIDA STATUTES

601.02 Purposes

This chapter is passed:

(1) In the exercise of the police power to protect health and welfare and to stabilize and protect the citrus industry of the state.

(2) Because the planting, growing, cultivating, spraying, pruning, and fertilizing of citrus groves and the harvesting, hauling, processing, packing, canning, and concentrating of the citrus crop produced thereon is the major agricultural enterprise of Florida and, together with the sale and distribution of said crop, affects the health, morals, and general economy of a vast number of citizens of the state who are either directly or indirectly dependent thereon for a livelihood, and said business is therefore of vast public interest.

(3) Because it is wise, necessary, and expedient to protect and enhance the quality and reputation of Florida citrus fruit and the canned and concentrated products thereof in domestic and foreign markets.

(4) To provide means whereby producers, packers, canners, and concentrators of citrus fruit and the canned and concentrated products thereof may secure prompt and efficient inspection and classification of grades of citrus fruit and the canned and concentrated products thereof at reasonable costs, it being hereby recognized that the standardization of the citrus fruit industry of Florida by the proper

grading and classification of citrus fruit and the canned and concentrated products thereof by prompt and efficient inspection under competent authority is beneficial alike to producer, packer, shipper, canner, concentrator, carrier, receiver, and consumer in that it furnishes them prima facie evidence of the quality and condition of such products and informs the carrier and receiver of the quality of the products carried and received by them and assures the ultimate consumer of the quality of the products purchased.

(5) To stabilize the Florida citrus industry and to protect the public against fraud, deception, and financial loss through unscrupulous practices and haphazard methods in connection with the processing and marketing of citrus fruit and the canned or concentrated products thereof.

(6) Because said act is designed to promote the general welfare of the Florida citrus industry, which in turn will promote the general welfare and social and political economy of the state.

In the event any word, phrase, clause, sentence, paragraph, or section of this chapter is declared unconstitutional by any court of competent jurisdiction, then such declaration of such unconstitutionality shall not affect the remainder of this chapter, and the unconstitutional portion shall be considered severable, it being the intent of the legislature that the remainder of this chapter shall continue in full force and effect.

601.04 Florida citrus commission

(1) There is hereby created and established a state citrus commission to be known and designated as the "Florida

citrus commission" to be composed of twelve practical citrus fruit men who are resident citizens of the state, each of whom is and has been actively engaged in growing, or growing and shipping, or growing and processing of citrus fruit in the state for a period of at least five years immediately prior to his appointment to the said commission and has, during said period, derived a major portion of his income therefrom or, during said time, has been the owner of, member of, officer of, or paid employee of a corporation, firm, or partnership which has, during said time, derived the major portion of its income from the growing, or growing and shipping, or growing and processing of citrus fruit.

Seven members of said commission shall be designated as grower members and shall be primarily engaged in the growing of citrus fruit as an individual owner, or as the owner of, a member of, an officer of, or a stockholder of a corporation, firm or partnership primarily engaged in citrus growing, and none of whom shall receive any compensation from any licensed citrus fruit dealer or handler as defined in § 601.03 (other than gift fruit shippers), but any of said grower members shall not be disqualified as a member if, individually, or as the owner of, a member of, an officer of or a stockholder of a corporation, firm or partnership primarily engaged in citrus growing which processes, packs and markets its own fruit and whose business is primarily not purchasing and handling fruit grown by others, and one of said seven grower members shall be a resident of and appointed from each of the seven citrus districts as defined in § 601.09. Five members of said commission shall be designated as grower-handler members and shall be engaged as owners, or paid officers or employees of a corporation, firm, partnership or other busi-

ness unit engaged in handling citrus fruit. Two of said five grower-handler members shall be engaged in the fresh fruit business and three of the said five grower-handler members shall be engaged in the processing of citrus fruits. One of the said five grower-handler members shall be appointed from citrus district No. 7 and the remaining four shall be appointed from the state-at-large but of these four no two members shall be appointed from the same citrus district.

601.10 Powers of the Department of Citrus

The Department of Citrus shall have and shall exercise such general and specific powers as are delegated to it by this chapter and other statutes of the state, which powers shall include, but not be confined to, the following:

(1) To adopt and, from time to time, alter, rescind, modify, or amend all proper and necessary rules, regulations, and orders for the exercise of its powers and the performance of its duties under this chapter and other statutes of the state, which said rules and regulations shall have the force and effect of law when not inconsistent therewith.

* * *

601.15 Advertising campaign; methods of conducting; excise tax; emergency reserve fund; citrus research

(1) The administration of this section shall be vested in the department of citrus which shall prescribe suitable and reasonable rules and regulations for the enforcement hereof and the department of citrus shall administer the taxes levied and imposed hereby. Said department of citrus shall have power to cause its duly authorized agent or representative to enter upon the premises of any handler of

citrus fruits and to examine or cause to be examined any books, papers, records, or memoranda bearing on the amount of taxes payable and to secure other information directly or indirectly concerned in the enforcement hereof. Any person required to pay the taxes levied and imposed who shall by any practice or evasion make it difficult to enforce the provisions hereof by inspection or any person who shall, after demand by the department of citrus or any agent or representative designated by it for that purpose, refuse to allow full inspection of the premises or any part thereof or any books, records, documents, or other instruments in any manner relating to the liability of the taxpayer for the tax imposed or shall hinder or in anywise delay or prevent such inspection shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

(2) The Department of Citrus shall plan and conduct a campaign for commodity advertising, publicity, and sales promotion to increase the consumption of citrus fruits and may contract for any such advertising, publicity, and sales promotion service. To accomplish such purpose, the Department of Citrus shall have power, and it shall be its duty:

(a) to disseminate information relating to:

1. Citrus fruits and the importance thereof in preserving the public health, the economy thereof in the diet of the people, and the importance thereof in the nutrition of children;

2. The manner, method, and means used and employed in the production and marketing of citrus fruits and to

laws of the state regulating and safeguarding such production and marketing;

3. The added cost to the producer and dealer in producing and handling citrus fruits to meet the high standards imposed by the state that insure a pure and wholesome product;

4. The effect upon the public health which would result from a breakdown of the Florida citrus industry or any part thereof;

5. The reasons why producers and dealers should receive a reasonable return on their labor and investment;

6. The problem of furnishing the consumer at all times with an abundant supply of fine quality citrus fruits at reasonable prices;

7. Factors of instability peculiar to the citrus fruit industry, such as unbalanced production, effect of the weather, influence of consumer purchasing power, and price relative to the cost of other items of food in the normal diet of people, all to the end that an intelligent and increasing consumer demand may be created;

8. The possibilities with particular reference to increased consumption of citrus fruits; and

9. Such other, further, and additional information as shall tend to promote increased consumption of citrus fruits and as may foster a better understanding and more efficient cooperation among producers, dealers, and the consuming public; and

(b) To decide upon some distinctive and suggestive trade name and to promote its use in all ways to advertise Florida citrus fruit.

(3)(a) There is hereby levied and imposed upon each standard-packed box of citrus fruit grown and placed into the primary channel of trade in this state an excise tax at annual rates for each citrus season as determined from the tables in this paragraph and based upon the previous season's actual statewide production as reported in the United States Department of Agriculture Citrus Crop Production Forecast as of June 1.

* * *

(7) All excise taxes levied and collected under the provisions of this chapter shall be paid into the State Treasury on or before the 15th day of each month, such moneys to be accounted for in a special fund to be designated as the Florida Citrus Advertising Trust Fund, and all moneys in such fund are hereby appropriated to the Department of Citrus for the following purposes:

(a) Two percent of all income of a revenue nature deposited in this fund, including transfers from any subsidiary accounts thereof, shall be deposited in the General Revenue Fund in lieu of the service charge provided for in s. 215.20; provided, however, that if any moneys are withdrawn from the trust fund for investment, such 2 percent shall not again be charged against said moneys when they are redeposited in the trust fund.

(b) An amount equal to one-half of the amount deposited in the General Revenue Fund pursuant to paragraph (a) shall be set aside in the Florida Citrus Advertising Trust Fund to be used exclusively for citrus research by the Department of Citrus.

(c) Not more than 24 percent of such trust fund shall be expended for the activities authorized by ss. 601.13 and

601.14 and for the cost of those general overhead, research and development, maintenance, salaries, professional fees, enforcement costs, and other such expenses which are not related to advertising, merchandising, public relations, trade luncheons, publicity, and other associated activities. The cost of general overhead, maintenance, salaries, professional fees, enforcement costs, and other such expenses which are related to advertising, merchandising, public relations, trade luncheons, publicity, and associated activities shall be paid from the balance of the Citrus Advertising Trust Fund and shall not be included in the 24-percent limitation.

(d) An amount equal to 25 percent of the excise taxes levied and imposed by this section upon oranges shall be set aside in the Florida Citrus Advertising Fund as a reserve fund to be used only to conduct intensive campaigns of commodity advertising and sales promotion of oranges, processed orange products, or orange byproducts. Upon the completion of any such intensive campaign of commodity advertising and sales promotion, the balance remaining shall be retained in said reserve fund. The sums so set aside in said special reserve fund shall not be removed therefrom but shall continue to be so held solely for use in campaigns of commodity advertising and sales promotion of oranges, processed orange products, or orange byproducts.

(e) The balance of the moneys in the Florida Citrus Advertising Trust Fund shall be used by the Department of Citrus for defraying those expenses not included within the 24-percent limitation established by paragraph (c). After payment of said expenses, the money levied and collected under the provisions of subsection (3) shall, ex-

cept as provided in paragraph (f), be used exclusively for commodity advertising, merchandising, publicity, or sales promotion of citrus fruits, either in fresh or processed form, including citrus cattle feed and all other products of citrus fruits, produced in the state, in such equitable manner and proration as the Department of Citrus may determine, but funds expended for advertising thereunder shall be expended through an established advertising agency.

(f) Upon an affirmative vote of nine of its members, the commission may, during each year for no more than 3 consecutive years, authorize up to 10 percent of the moneys levied and collected under the provisions of subsection (3) during each of the years, up to a maximum of 3 years, to be expended for noncommodity advertising merchandising, publicity, and sales promotion of such citrus fruits and products thereof, including brand advertising rebate programs that supplement other department advertising, merchandising, publicity, or sales promotion activities. The moneys expended hereunder shall be expended in regard to such citrus fruits and products thereof in such equitable manner and proration as the Department of Citrus may determine.

601.99 Unlawful to misbrand wrappers or packages containing citrus fruit

It is unlawful for any person to misbrand any package or any wrapper containing citrus fruits or any container of the canned or concentrated products thereof, and all citrus fruits and the canned or concentrated products thereof shall be deemed misbrands if the package or the wrapper or the container thereof shall bear any statement, design,

or device regarding the fruit therein contained which is false or misleading either as to the name, size, quality, or brand of such fruit or the canned or concentrated products thereof or as to the locality in which it was grown.

601.9912 Penalties

Any person violating any provision of this chapter or the rules or regulations of the department of citrus, or of the department of agriculture shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

APPENDIX G

Testimony of Dr. Jerry F. Proctor

[958] DR. JERRY F. PROCTOR, called as a witness by Krafteo Corporation, being first duly sworn, testified as follows:

Direct Examination by John M. Creger, Esq.

Q. State your name for the record, please.

A. Jerry F. Proctor.

Q. What is your business or occupation?

A. I'm manager of nutrition research for Krafteo Corporation.

Q. What are your duties in connection with that position?

A. Developing nutrition information about Krafteo products and establishing nutritional policies on restoration or fortification of nutrients to those products, positioning of products in the marketplace from a nutritional standpoint by [959] nutritional labeling, advertising and consumer messages and by answering inquiries directly from consumers and professionals. Also liaison with professional organizations such as the Nutrition Foundation, the Institute of Nutrition, Grocery Manufacturers Association, the American Medical Association and the National Dairy Council.

Also, it's my responsibility to review regulations of the FDA and the FTC as they affect nutritional claims of Krafteo's products.

Q. Can you summarize your training, experience and educational bankground?

A. I have a Bachelor of Science degree from Texas A & M University, Master of Science degree Cornell University, Doctor of Philosophy degree in nutrition, biochemistry and physiology from Cornell University.

Q. Have you published, Dr. Proctor?

A. I've published scientific papers and technical literature including my doctorate thesis which had to do with Selenium in its role in muscular dystrophy, also publications in the proceedings of the Society for Biology and Medicine, the Journal of Nutrition. I gave a paper on the possible effects of nutrition labeling regulations [960] on fat in the diet before the American Oil Chemists Society and recently published a chapter on nutrition, food composition and nutrient aspects of food processing in the Encyclopedia of Food Technology.

Mr. Creger: Mr. Hearing Examiner, I wish to enter as an exhibit at this time Dr. Jerry F. Proctor's vita.

[The four-page copy of Vita, Jerry F. Proctor was marked as Kraftco Corporation Exhibit No. 2.]

Q. Now, Dr. Proctor, during the deposition, Mr. Baldwin testified that the purpose of the Department of Citrus advertising campaign was to make people think Florida orange juice is in some way superior to other orange juice. Have you conducted a survey on the nutritional properties of orange juice from various geographical locations including among others California and Brazil?

A. Yes, I have. I conducted a rather exhaustive search of the technical literature; a review was made in this respect and I might say, a rather extensive one.

[961] Q. Did your survey provide any indication that Florida orange juice is nutritionally superior to other orange juice from other geographical locations?

A. No, it did not. The Florida quality standards are high as far as organoleptic quality, that is, the brix or

soluble sugar level, sugar-to-acid balance, but I'm not aware of any standard that insures any nutrient level in Florida orange juice.

Q. Now, as I understand your testimony, you are not testifying that Florida orange juice is nutritionally inferior, but only that it is the same or approximately the same nutritionally as orange juice not from Florida.

A. That is correct.

Q. Are you familiar with proposed regulation 20-66.04?

A. Yes, I am.

Q. What do you understand it to require?

A. That effective September 30th, 1977, all processed grapefruit products labels shall bear either "Florida," "Packed in Florida" or "From Florida" prominently on one principal display panel at least one time; also that effective September 30, 1978, that the same will pertain to all processed [962] orange products.

Q. Are you familiar with the advertising campaign conducted by the Florida Department of Citrus?

A. Yes, I've reviewed the advertising campaign for the past five years.

Q. Does this advertising campaign consist in part of nutrition claims?

A. Yes, it does, to a large extent, the central theme of many of the ads are nutrition or therapeutic claims.

Q. Can you provide the Commission with some examples of these claims?

A. If we may have the slides on the 35 millimeter projector.

[Slides being shown]

A. These are examples of ads that have appeared in the professional literature, namely a publication entitled Nu-

trition Today. I won't bother to dwell on each slide, but it's just a series of slides indicating the type of nutritional and therapeutic claims that have been made. Here, you'll see, "You'll find a lot more in Florida citrus than Vitamin C."

Next slide. This ad is entitled "Food or medicine," indicating a distinct nutritional or [963] therapeutic theme.

Next slide. "Mealtime, snacktime, anytime." This ad further depicts patients in hospital situations, geriatrics' homes and gives nutritional information on orange juice.

Next slide. "Everyone is talking about Vitamin C." And it says down at the bottom, "If you want your patients to benefit from Vitamin C and a lot more, recommend citrus from Florida."

Next slide. "Delicious potassium," indicating a therapeutic claim for the benefits of high potassium level in combatting edematous conditions such as found in pregnancy and hypertension.

Next slide. "Eating for two," indicating a need for additional nutrient intake in pregnancy and vitamin levels are given, "Vitamin C content of Florida citrus juice."

Next slide. "As the twig is bent, so grows the tree," indicating the need for Vitamin C in infancy in growth periods. Also, again, the average Vitamin C content of Florida orange juice products.

Next slide. "The good life, just what the [964] doctor ordered," again indicating the value of citrus products over a wide spectrum of the life span from pregnancy to infancy and on into geriatrics.

Next slide. Again, emphasizing the need over a life span focusing on pregnancy, infancy, growth stages, middle age and geriatrics; and again emphasizing citrus fruit and juices from Florida.

Next slide. Again, indicating the value of certain nutrients during critical stages. Here, the focus is on folic acid

and it says specifically, "What does 100 percent pure orange juice from Florida have that both of these women need." Below that, it says, "Folic acid needs are increased by both pregnancy and oral contraceptives. Orange juice is an unusually good source of folic acid."

I think you will agree that the tenor of all these ads has nutritional therapeutic connotations.

The last slide, indeed, shows a setting of physicians, nurses, dieticians gathered around a glass of Florida orange juice and indicates rather substantially high levels of various nutrients found in orange juice and we will come [965] back to this slide at a later point.

Q. Now, this series of slides represents the series of ads run in what publication?

A. The publication is entitled Nutrition Today.

Q. Do you know what the distribution of that publication is, Dr. Proctor?

A. It is to professionals, physicians, dieticians, nurses and students. There's a rather large distribution to students and undoubtedly, it reaches the consuming public in the offices of many physicians.

Q. Thank you. Now, I want to hand you two advertising scrapbooks which are in the custody and possession of the Commission which represent further advertising. One is entitled Advertising Scrapbook '74-75 and the other is entitled Advertising Scrapbook '75-76.

A. These represent a part of the materials which we have reviewed of advertising conducted by the Florida Citrus Commission. They're only a part of what we reviewed and we're just illustrating a few of these again to note the nutritional and therapeutic claims that have been made and particularly in publications recently that are directed at the consuming public and not [966] professionals.

Appendix G—Testimony of Dr. Jerry F. Proctor

Q. Can you show us some examples of advertising from those scrapbooks?

A. I'm sure there's no way to show the Commission and the audience these ads, so I'll just indicate with reading a few of the words from each ad.

This one was prepared for Ladies' Home Journal, Redbook and Family Circle and appeared in February, 1975, issues. It says, "Because you're a woman, a reason to learn the pure facts about orange juice." And it pictures a pitcher of orange juice bearing Florida Orange Growers and bearing the Florida Citrus Tree logo. It again focuses on the need for folic acid. It says, "What does folic acid do? Folic acid is a vitamin that's involved in making new cells. That's really important during pregnancy and in making red blood cells. Without folic acid, you could become very anemic." There are several of these ads and I won't bother to read all of the lines from them, but the central theme follows through on each one.

The next ad was also in the February, 1975, issues of Ladies' Home Journal, Redbook and Family Circle. It focuses on the potassium [967] content and what potassium does. It says, "Potassium is a mineral needed for normal muscle functioning. Foods high in potassium and low in salt are important for anyone taking diuretics." Again, tying in with therapeutic connotations.

The next ad is a similar one also addressing itself to potassium. It was designed for Ladies' Home Journal, Redbook and Family Circle also. And at last one shows a photograph of the physician discussing, I presume, her physical condition with a lady and it says, "If you're prescribing diuretics, here's why you should prescribe 100 percent pure orange juice from Florida." Gentlemen, this puts the product in the category of a drug, I believe. This

appeared in the Journal of the American Medical Association, Medical Economics, Medical World News, Nutrition Today, American Journal of Cardiology and Obstetrics and Gynecology News and in Pediatrics. Imagine the number of doctors' waiting offices that have a copy of this in them.

Again, another dealing with pregnancy and the need for folic acid. This appeared in the Journal of the American Medical Association in March of this year and in the American Journal of Public [968] Health in May of this year.

One last storyboard ad from Anita Bryant, a TV ad. It shows her in one sequence of the storyboard and it says, —she is speaking—"Warm days call for refreshment and good nutrition should be a part of it with orange juice from Florida," and it pictures a glass of orange juice and she says, "Rich in Vitamin C," and then it shows a young boy drinking the glass and it says, "Plus B vitamins and minerals every family needs." I think that's the extent of the ads.

Q. This last storyboard appears in the book entitled Advertising Scrapbook 1975-76, correct?

A. That's correct.

Mr. Creger: Mr. Hearing Examiner, at this time, we would like to mark both scrapbooks as exhibits and offer them in evidence at this time.

Mr. Haviser: I think they're already in evidence.

Presiding Officer Campbell: I think they are in evidence and you were going to take photographs [969] of them, were you not, Mr. Haviser, and substitute them for the actual scrapbooks?

Mr. Haviser: I think they're Canners Exhibit No. 15 and it's stated that they're retained by the Com-

mission, the scrapbook and the Mapes-Ross Reports were not copied.

Mr. Creger: I recall the stipulation; I'm not certain they've been offered in evidence.

Presiding Officer Campbell: I think you gave a number, didn't you?

Mr. Haviser: Canners Exhibit No. 15.

Q. Now, Dr. Proctor, do most, if not all of the ads, which you've just testified to, in addition to making nutrition claims, also stress that the citrus products advertised are "From Florida"?

A. Yes, they do, by such designations as identifying the Florida Citrus Commission, by picturing the Florida Sunshine Tree logo and furthermore bearing the words Florida Citrus Growers and, as you [970] noticed, as we went through several of those, they also indicated in the verbiage of the ad that the product is from Florida, in other words, Florida orange juice or words to the effect, orange juice from Florida.

Q. Are you aware that if the proposed regulation goes into effect the Department of Citrus intends to add to its advertising campaign the words "Look for Florida on the label" or words of similar import?

A. Yes, I'm aware of that.

* * *

[988] * * *

Q. Dr. Proctor, do you have evidence in your possession with regard to the variability of certain nutrients in citrus products?

A. Yes, I do.

Q. How was that evidence prepared?

Appendix G—Testimony of Dr. Jerry F. Proctor

Commissioner Hamrick: I can't understand the questions or the answers.

Mr. Creger: There will be copies left with the Commission and Dr. Proctor intends to show his evidence on the transparency projector here.

A. To illustrate the variability of certain nutrients in citrus products, I have some slides that will indicate the variability that was encountered in [989] the study conducted recently on frozen concentrated orange juice by the workers at the station here and I'll take just a minute to set up that projector.

[Transparencies being shown]

These data are taken from the study mentioned previously and they represent the Vitamin C content found in 404 individual samples of frozen concentrated orange juice. These samples were obtained from 23 plants producing the products here in the state. They were analyzed without any storage life on the product, without any abuse to the product, so they might represent rather optimum conditions. They do indicate that the Vitamin C found in these samples vary from 80 percent of the U.S. RDA to upwards of 175 percent of the U.S. RDA with an average of about 130 percent of the U.S. RDA. This indicates the magnitude of the variability found in these samples over one season. It is about a hundred percent or twofold variability.

This is a similar histogram showing the distribution of data found for the frequency of the magnesium content of 424 of the same type of samples collected and it indicates almost a [990] sixfold variability ranging from less than what one could state on a label, the minimum level of that being two percent of the U.S. RDA. One sample was found below that; one sample was found as high as

between 7.2 and 7.5 percent of the U.S. RDA or approximately a sixfold variability.

> Mr. Peterson: Doctor, as far as magnesium is concerned, this is optional and not required nutritional labeling, is that correct?
>
> Dr. Proctor: Yes. We're just using these as illustrations of the variability of the data and a manufacturer would have to make his own decisions as to whether he showed only the mandatory data or chose to extend it to the optionai nutrients.
>
> Mr. Peterson: The same thing is true with this exhibit to folic acid, is that correct?
>
> Dr. Proctor: That's correct.
>
> Commissioner McClure: Dr. Proctor, did you say who ran these tests?
>
> Dr. Proctor: These were run, it's [991] my understanding, by the personnel at the Agricultural Experiment Station, specifically Dr. Attaway's group including Dr. Ting.

These show the folic acid content of the 326 samples analyzed ranging from eight percent of the U.S. RDA to 32 percent or about a fourfold variation in folic acid content. Bring to mind, if you will, the comment I made earlier about these determinations being made by the methodology that at this moment does not have official sanction and previous data reported in the literature for folic acid would indicate only about two percent of the U.S. RDA.

Here's the frequency distribution of thiamine, content of 260 such samples, indicating a range of from seven-and-a-half percent of the U.S. RDA to twelve-and-a-half percent. In line with your comment earlier, I should say

that thiamine is one of the mandatory nutrients. Frequency distribution here is displayed of Vitamin B_6 content for 185 samples ranging from 3.6 to 5.6, indicating that there is not the type of variability in this vitamin as in some of the [992] other nutrients. Vitamin B_6 is also an optional nutrient.

Mr. Creger: Mr. Hearing Examiner, at this time, we offer the graphs Dr. Proctor has just testified to in evidence as graphic representation of the work of Doctors Attaway and Ting and also as evidence of the wide swings in nutrient characteristics of citrus products.

Presiding Officer Campbell: All right. Let them be received.

[The graphs were marked as Krafteo Corporation Exhibit No. 3: Frequency Distribution of Vitamin C, 3 A; Frequency Distribution of Magnesium, 3 B; Frequency Distribution of Folic Acid, 3 D; Frequency Distribution of Vitamin B_6, 3 E.]

By Chairman Richardson:

Q. You're talking on frozen concentrated orange juice—would the same variables hold true for frozen concentrated grapefruit juice or single strength [993] canned grapefruit juice?

A. The variability in canned product in all likelihood would be much greater because of the nutrient destruction during the heat processing of canning, so all canned products, I think it can be assumed, would show greater variability. Likewise, all products stored or packaged in cardboard cartons would show a greater degree of variability,

due to processing losses, due to abuse in handling in the distribution chain, et cetera. So, I think while I'm using these data to illustrate a point, I should make the additional point that FCOJ could be expected to display less variability than other citrus products.

Direct Examination by John M. Creger, Esq. [Continued]:

Q. Dr. Proctor, these data indicate a really dramatic swing in the nutrient levels of citrus products. Do they suggest that perhaps the only remedy a manufacturer can utilize to assure himself that he will not violate FDA nutrition labeling and mislabeling regulations is to substantially underdeclare the nutrient values of his products?

[994] A. That would appear to be the only viable alternative—is to understate the nutrient value particularly as I mentioned earlier on other types of products aside from frozen concentrate.

Q. From a nutritionist's standpoint, nutritionally speaking, Dr. Proctor, what's wrong with substantial underdeclaration?

A. This would mislead the average consumer in that he would consistently be underestimating his ingestion of nutrients. This could be heightened in its effect particularly where dieticians and physicians are attempting to rigidly control nutrient intake. It might lead the consumer to overcompensate by the consumption of dietary supplements and/or vitamin-mineral and multifortified products; and this practice might lead to the consumption of levels of certain nutrients which may not be either necessary or desirable from a nutritional standpoint.

Q. To your knowledge, has the Department of Citrus published any advertising which informs consumers of the levels of nutrients in any citrus products?

A. Yes, and as just one illustration of that, if we could return to the last 35 millimeter slide.

[995] [Slide shown]

The Commission in this ad is educating physicians and dieticians and the consumers to believe in those nutrient values expressed here for orange juice. This ad shows 156 percent of the U.S. RDA for Vitamin C. If you'll reflect on the previous data we were showing, the average content was 130 in the FCOJ samples analyzed and ranged down as low as 80 percent of the U.S. RDA; and for reasons I just expressed, we can expect canned products to run even more variable and perhaps would have to declare even lower values. This ad also shows 15 percent of the U.S. RDA for folic acid. I think we have to reflect on what was mentioned earlier about the methodology that was used here and whether or not one could substantiate these levels on a processor's label.

The magnesium content here shows six percent of the U.S. RDA, and in addition, the sodium and potassium levels are defined, of course, not in terms of U.S. RDA, because there are none for these particular minerals. My point being in showing this slide is that the Commission has educated professionals and consumers that these are levels to be expected in orange juice. Now, [996] if labeling is invoked as mandatory, we're going to have a job confronting us of reeducating the professionals and the consumers that the product may not contain these levels which we had purported for the product previously and, as my father occasionally would find me in such a compromising situation, he would say, "Son, were you lying then or are you lying now?"

APPENDIX H

Photographs of Citrus Commission Advertisements Carried in Magazines and on Television

(see opposite) ☞

Most diets from pregnancy to geriatrics should include Citrus Fruit and Juices from Florida.

Here's why: Nearly everyone can benefit from the pure natural nutrients in Citrus Fruit from Florida. Whether your patients prefer whole fresh oranges and grapefruit or citrus juices – fresh, frozen, canned or chilled – you can be sure that the nutrients, including the vitamin C, have been preserved. Citrus Fruit and Juices provide a natural blend of nutrients, including vitamin C, essential B-vitamins, minerals, and carbohydrates plus significant amounts of potassium, and only a trace of sodium. Citrus Fruit and Juices are recommended as natural energizers that won't dull the appetite – useful not only at breakfast, but at other meals and for snacks as well. In fact, think of light, satisfying Citrus Fruit as the prescription your patients love to take.

FLORIDA CITRUS GROWERS

If you're prescribing diuretics, here's why you should prescribe 100% pure Orange Juice from Florida.

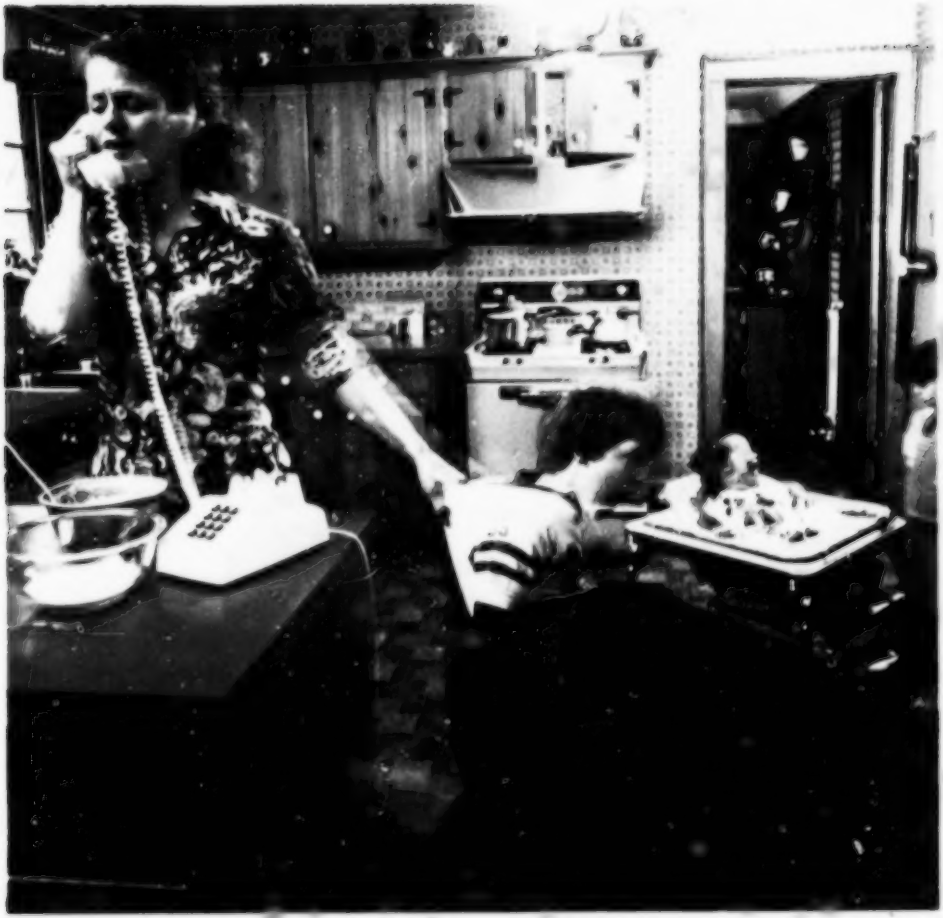
The usage of diuretics may cause potassium deficiency.

Normally potassium deficiency is not encountered since it is a common nutrient found in many foods. However, when halogenated thiazide diuretics (so useful in treating hypertension and edematous conditions) are prescribed, potassium depletion may be an unwanted side-effect. Just from the precautionary statements accompanying their labelling, it is evident that potassium loss, particularly in association with effective diuresis, is a common problem that can affect a large number of people.

Orange juice can help in this situation.

Since potassium supplementation can sometimes be difficult to maintain, the patient should be encouraged to consume foods with a considerable amount of potassium. Orange juice is such a food. Just a few servings daily (three 4 fl. oz. cups of pure orange juice) will provide a substantial amount of potassium. The high potassium to sodium ratio of orange juice makes it a particularly good choice for effective yet preventive therapy with thiazide diuretics. Why not prescribe this to your patients? Most of your patients will enjoy this delicious, pure orange juice from Florida.

FLORIDA ORANGE GROWERS



Everyday stress.
A reason to learn the pure facts about orange juice.

Anyone who's ever had "one of those days" knows about stress. But did you know emotional stress can accelerate potassium loss? Potassium loss is also caused by the water reducing pills, known as diuretics, often used to treat high blood pressure. Ask your doctor.

What does potassium do?

Potassium is a mineral needed for normal muscle functioning. Foods high in potassium and low in salt are important for anyone taking diuretics. Such foods are fresh fruit, vegetables and 100% pure orange juice.

*United Fresh Department of Agriculture, 1975

Why is orange juice such a good source of potassium?

Orange juice provides a good amount of potassium and almost no sodium. So it's a good food for people with high blood pressure whether their treatment involves diuretics or a salt restricted diet. In fact, orange juice has been recommended by the American Heart Association for use in low salt diets.

Those are the pure facts. Isn't it nice to know that something so delicious can be so good for you?

100% PURE ORANGE JUICE FROM FLORIDA

What does 100% pure Orange Juice from Florida have that both these women need?

Folic acid needs are increased by both pregnancy and oral contraceptives

Orange juice is an unusually good source of folic acid

FLORIDA ORANGE GROWERS

Here's why you should recommend Orange Juice from Florida.

The next time you formulate or prescribe a diet, be sure it includes pure Orange Juice from Florida. Every glassful contains all of the good "reasons why" listed below. Orange Juice derives its nutritive potency from a blending of these elements, plus other essential vitamins and minerals. Orange Juice from Florida is 100% juice—no synthetic additives—whether it comes fresh, frozen, canned or chilled.

Remember, too, that Orange Juice is a natural energizer, with natural sugars, so recommend it often—for breakfast, and as an energy snack throughout the day.

Because you're a woman.
A reason to learn the pure facts about orange juice.

You need some things more than a man. If you're pregnant or on the pill, there's something you especially need. Something you may have never even heard of: folic acid.

What does folic acid do?

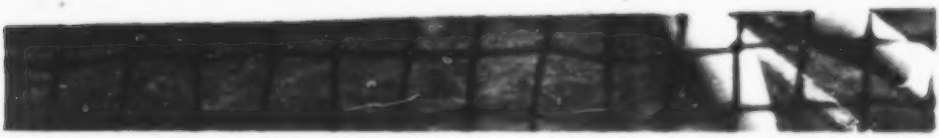
Folic acid is a vitamin that's involved in making new cells (that's really important during pregnancy), and in making red blood cells. Without folic acid you could become anemic. If you want to know more, ask your doctor. Folic acid is especially found in foods such as green leafy vegetables, liver and 100% pure orange juice.

Why is orange juice such a good source of folic acid?

Not only does orange juice supply a good amount of folic acid, you drink it in its pure natural state. That's important because cooking can destroy up to 95% of the folic acid in foods. Besides, orange juice is one of the most delicious sources of folic acid around.

Those are the pure facts. Isn't it nice to know that something so delicious can be so good for you?

100% PURE ORANGE JUICE FROM FLORIDA



Your athletic family.
A reason to learn the pure facts about orange juice.

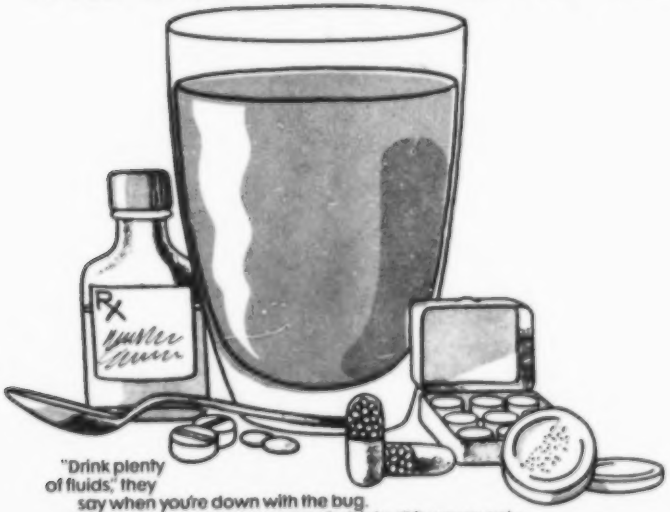
Why is orange juice such a good source of potassium?

What does potassium do?

100% PURE ORANGE JUICE FROM FLORIDA

CHASE THE "FLU BLUES"

With Citrus Juices from Florida



"Drink plenty of fluids," they say when you're down with the bug.

We say: "Drink orange or grapefruit juice!" Because only these fluids have the delicious tastes that chase the "flu blues." And citrus juices are loaded with healthful vitamin C that helps you come back strong. Better yet, try orange or grapefruit juice as a chaser for aspirin, pills and capsules. Or drop a tablespoon of your favorite fizz-type flu-fighter in a glassful. For goodness sake, drink plenty of Orange and Grapefruit Juice from Florida. It'll chase the "flu blues." Nicely.

100% PURE ORANGE AND GRAPEFRUIT JUICES FROM THE FLORIDA SUNSHINE TREE.®

©

Florida Department of Citrus, Lakeland, Florida

DANCER-FITZGERALD-SAMPLE, INC.

Client: DEPT. OF CITRUS
Product: ORANGE JUICE
As Filmed/Recorded: COLOR
Title: "ATLANTIC CITY"
Commercial No.: FLOJ5359
Date: 8/25/75
Length: 30 SECONDS

1. (MUSIC UNDER) ANITA BRYANT: (SINGS) On the Boardwalk in Atlantic City.

2. We will walk in a dream.

3. (SFX UNDER) BRYANT: Warm days call for refreshment.

4. And good nutrition should be part of it, with orange juice from Florida.

5. Rich in vitamin C

6. plus B vitamins and minerals every family needs.

7. And no matter what form you buy, nothing's added.

8. It's 100% orange juice. The label says so.

9. Pure nutrition. You'll get it from the Florida sunshine tree.

10. (MUSIC OUT)

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1829

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

KRAFT, INC.,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF CITRUS,

Appellee.

On Appeal From The Supreme Court Of Florida

MOTION TO DISMISS

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May 7, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii, iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
PRODUCT IDENTIFICATION	5
COMMERCIAL SPEECH	7
CONCLUSION	9
APPENDICES	1a-9a

TABLE OF AUTHORITIES

CASES: Page

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 5

Bigelow v. *Virginia*, 421 US 809 (1975) 4

Central Hudson Gas and Electric Corp. v. *Public Service Comm.*, 447 U.S. 557 (1980) 6

Coca Cola Company, Foods Division, Polk County, Florida, et al v. *State of Florida, Department of Citrus*, 406 So 2d 1079 (1981) 1, 4, 5, 8, 9

Florida Canners Association v., State of Florida, Department of Citrus, 371 So 2d 503 (Fla 2 DCA, 1979) 1, 4

Hunt v. *Washington State Apple Advisory Comm.*, 432 U.S. 333 (1977) 5

Metromedia, Inc. v. *City of San Diego*, 101 S. Ct 2882 (1981) 6

Ohralik v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978) 5, 7

Pacific State Box Co. v. *Basket Co.*, 296 U.S. 176 (1935) . 6

Pike v. *Bruce*, 397 U.S. 137 (1970) 5

Polk Co. v. *Glover*, 305 U.S. 5 (1938) 3

Sligh v. *Kirkwood*, 237 U.S. 52 (1914) 3

Virginia State Board of Pharmacy v. *Virginia Citizens Council, Inc.*, 425 U.S. 748 (1976) 5, 6

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943) 7, 8

Wooley v. *Maynard*, 430 U.S. 705 (1977) 5, 6

STATUTES:

Fla. Stat. 601.02 3

Fla. Stat. 601.15(2) 3

Fla. Stat. 601.9906 6

RULES:

Fla. Dept. of Citrus, Rule 20-66.04 ..... 2, 3, 4

Fla. Dept. of Citrus, Rule 20-94 2

Fla. Dept. of Citrus, Rule 20-64.01-.03 6

Table of Authorities Continued

Page

OTHER:

46 Fed. Reg. 17, pg. 8462, Jan. 27, 1981 6

Tit. 15 USCA, § 1453 (1966) 6

Tit. 21 USCA, § 343 (1938) 6

IN THE

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Appellee.

On Appeal From The Supreme Court Of Florida

MOTION TO DISMISS

MAY IT PLEASE THE COURT: Appellee moves that the Appeal herein taken be dismissed on the ground that said Appeal does not present a substantial federal question.

OPINION BELOW

This is an appeal from a decision from the Supreme Court of Florida rejecting Appellant's contention that Rule 20-66.04 of the Department of Citrus of the State of Florida denies the Appellant of its constitutional right under the First Amendment to the Constitution of the United States. The Florida Supreme Court, in the decision of *Coca Cola Company, Foods Division, Polk County, Florida, et al* v. *State of Florida, Department of Citrus*, 406 So 2d 1079 (1981) affirmed with one dissent, the opinion of the Florida District Court of Appeals in *Florida Canners Association* v. *State of Florida, Department of Citrus*, 371 So 2d 503 (Fla 2 DCA 1979) which had upheld the validity

of the Department of Citrus Rule 20-66.04 published in the Florida Administrative Code (1979) and reprinted in Appellant's Appendix F.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Appellant's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent Constitutional and statutory provisions are set forth in the Appellant's jurisdictional statement.

STATEMENT OF THE CASE

Department of Citrus Rule 20-66.04, which is a part of the Florida Administrative Code, provides that all Florida processed grapefruit products, which are packed in retail containers in Florida, are required to be identified by the use of the word "Florida" or the "Florida Sunshine Tree" registered certification mark (US Registration No. 941, 773) as described in and authorized by the Department of Citrus Rule 20-94 (Appellee's Appendix A) including the surrounding phrase "a product of the Florida Sunshine Tree". This Rule goes on to establish more specifically the displaying of the word "Florida" or the certification mark. The identification requirements established under Department of Citrus Rule 20-66.04 is limited in its application. First, the identification required to be used is either the word "Florida" or the certification mark of the "Florida Sunshine Tree" surrounded by the words "a product of the Florida Sunshine Tree". Second, only retail containers are required to bear either identification. Third, the identification is only required to be on retail containers where the Florida grapefruit product was grown and processed in Florida. Fourth, non-Florida grapefruit product, in any mixture with Florida grapefruit product, even though processed in Florida, would be exempt from the identification requirement. Fifth, the require-

ment is one of identification, not labeling. The word "Florida" or the certification mark need not be placed as a label, but may appear on the container end.

As the Appellant acknowledges, the Department of Citrus has been in existence (previously as the Florida Citrus Commission) since 1935. By Statute, it has been authorized to "protect the health and welfare and to stabilize and protect the citrus industry of the state." Fla. Stat. § 601.02 (1982). (Appellant's Appendix F.) Even this Court has recognized the importance of the Florida citrus industry, now over a two billion dollar business, to the state's economy and the importance of protecting that industry. See, *Sligh* v. *Kirkwood*, 237 U.S. 52 (1914); *Polk Co.* v. *Glover*, 305 U.S. 5 (1938). There is no doubt the purpose of the Department of Citrus as well as its rules are for the protection of the consumer and promotion of the Florida citrus industry. The Department of Citrus continually spends over $2,000,000 a year to promote Florida grapefruit products. A more substantial amount is used to promote Florida orange products.

The function of the Department's Rule 20-66.04 is two-fold: 1) to insure that the consumer wishing to purchae grapefruit products will receive grapefruit product processed under statutory standards presently not established by either Federal or State law, other than Florida; 2) to provide a nexus with the promotional activities of the Department of Citrus of Florida citrus products. (see Fla. Stat. § 601.02[1]; Fla. Stat. § 601.15[2]; reprinted in Appellant's Appendix F and B respectively).

DECISIONS BELOW

The Florida District Court of Appeal and the Florida Supreme Court, in their Opinions, recognized the validity of the Rule's purposes. The District Court of Appeal found there was

a proper delegation of legislative power to the Department of Citrus beginning in the early 1930's. The Department of Citrus's authority to promote and protect Florida citrus was a valid exercise of the State's police power (Appellant's Appendix C, pg 44A-50A). As to the Appellant's contention that the Rule's operation, in effect, denies its commercial speech rights under the First Amendment, the District Court of Appeal relied on this Court's decision in *Bigelow* v. *Virginia*, 421 US 809 (1975) and stated "we believe the Court has simply said that there is a First Amendment interest at stake in commercial speech and that interest must be weighed against the public interest allegedly served by the regulation. Accordingly, we have engaged in the task of balancing the interest at stake in this case and have concluded that petitioner's First Amendment interests are not so great as to outweigh the public interest sought to be served by respondent's Rule 20-66.04. "*Florida Canner's Assn.*, Supra, 371 So 2d 503, 519 (Appellant's Appendix C, Pg 57A).

The Florida Supreme Court, in its Opinion, found the Appellant's First Amendment rights had not been violated by the retail container identification requirement under Rule 20-66.04. "Appellants' next point on appeal is that the Rule impermissibly abridges their First Amendment rights. In so arguing, appellants first contend that the labeling mandated by the Rule compels that they speak and adopt the statements of the State of Florida and become a messenger therefor. We disagree. They are simply required to indicate the origin of their product, if it originated in Florida. They are not being forced to trumpet the superiority or virtues of Florida citrus, and to suggest that this labeling requirement forces them to spread the "Florida message" exaggerates the Rules' effect. Appellants are merely being required to provide a factual statement which, if necessary and proper as this one is, is not an improper invasion of their First Amendment rights. "*Coca Cola Co.*, supra 406 So 2d 1080, 1087 (Apellant's Appendix A, p15a)

PRODUCT IDENTIFICATION

The Appellant makes sweeping claims of the effect of the Rule upon their commercial activity. The Rule only requires one of two identification marks to be placed on the Appellant's retail container, e.g. the word "Florida" or the Florida Sunshine Tree registration mark. The choice of identification mark is that of the Appellants. The identification is only requried on retail containers. The containers need only be identified under the Rule where they contain 100% grapefruit product which was Florida grown and Florida processed. Neither of the identification marks may be placed on any retail container which contents fail to meet the requirements of the Rule.

The Department of Citrus Rule does not require the Appellant to make an ideological statement or message. *Wooley* v. *Maynard*, 430 U.S. 705 (1977). The Supreme Court of Florida specifically considered the ramifications of *Wooley* and rejected that decision's applicability to Appellant's claim. "Were the State requiring a message such as 'Florida is Best', "Florida Citrus is Superior', or the like, the *Wooley* rationale might apply; as things stand it does not." *Coca Cola Co.* supra at 1087-88 (Appellants' Appendix A at p18a). The Rule does not prevent Appellant from placing any other identification mark or information on the container nor does the rule require the removal of any information from the Appellant's product. *Hunt* v. *Washington State Apple Advisory Comm.*, 432 U.S. 333 (1977).

The Department of Citrus Rule has no extra-territorial effect. It does not prohibit the Appellant from processing or packaging any citrus products in Florida or in another state. *Pike* v. *Bruce*, 397 U.S. 137 (1970). Appellant is not prevented from advertising its citrus products in any manner. *Virginia State Board of Pharmacy* v. *Virginia Citizens Council, Inc.* 425 U.S. 748 (1976); see also, *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik* v. *Ohio State Bar Assn*, 436 U.S. 447 (1978);

Central Hudson Gas and Electric Corp. v. *Public Service Comm.*, 447 U.S. 557 (1980); *Metromedia, Inc.* v. *City of San Diego*, 101 S. Ct 2882 (1981). As Appellant admits in its Jurisdictional Statement (p17) and as this Court has recognized, a State could require a "commercial message appear in such form, or include such additional information, warnings, and disclaimers as necessary to prevent it being deceptive." *Virginia State Board of Pharmacy*, supra at p772, n24. By requiring the use of the "Florida" identification to be placed upon a limited product line, the State is, at the least, certifying that the product was manufactured under the State statutory standards. Cf. *Wooley* v. *Maynard*, 430 U.S. 705, 715, n11. By requiring "Florida" to be placed on the retail container is a certification to the consumer that the grapefruit product found therein has met the Florida statutory standards for the production of grapefruit product, Fla. Stat. § 601.9906 and the Department of Citrus Rule implementing the statutory standard, Rule 20-64.01-.03 (Appellee's Appendix B). The Florida Statutory standard for the processing of grapefruit product is the only standard in the country. There will be no Federal standard as to grapefruit juice until 1983, and Federal processing standard will be less than the Florida standard. 46 Fed. Reg. 17, pg. 8462, Jan. 27, 1981. The Florida identification requirement is completely analogous to the Federal Fair Packaging and Labeling Program, Tit. 15 USCA § 1453 (1966); see also, Tit. 21 USCA § 343 (1938); *Pacific State Box Co.* v. *Basket Co.*, 296 U.S. 176 (1935).

The Fair Packaging and Labeling law requires the labels of a product to identify the commodity and the manner and place of business of the manufacturer, packer, distributer. Surely, this identification is no greater burden on the Appellant's First Amendment rights than the Department of Citrus Rule.

The Department of Citrus is granted legislative authority to insure that statutory grapefruit product standards are maintained. There could be no question as to the Department's right

to prevent manufacturers from placing on their grapefruit products the Florida identification marks where the grapefruit product did not meet Florida statutory processing standards. The same instance would be true were the Department to seek to prevent the use of its registered trademark, "The Florida Sunshine Tree", where the grapefruit products were not within the statutory requirements.

COMMERCIAL SPEECH

Appellant's First Amendment rights to "commercial speech" are recognized and acknowledged. However, this Court has noted the Constitution grants a lesser protection to "commercial speech" than to other constitutionally protected expression. *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447,457 (1978). From this constitutional platform, Appellant advances the proposition that its First Amendment rights of free speech are violated by the Department's Rule requiring grapefruit juice product identification. This alleged violation of First Amendment Rights are brought about because of a linkage between the identification mark placed on the retail grapefruit product container and the Department's advertisement campaign of Florida citrus products. The Supreme Court of Florida considered the Appellant's argument thusly; "On the same point appellants next contend that the state may not tell anyone what to say or think, and that the rule improperly forces appellants to express an opinion. We agree that the state may never force one to adopt or express a particular opinion.

> If there is any fixed star in our contitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, *or other matters of opinion* or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624,642 (1943). (emphasis supplied) (Footnote omitted). We

do not, however, agree that the mandatory labeling required by the rule forces the appellants to confess their faith in a matter of opinion. Again, we note that appellants are not being required to agree with or echo the content and theme of Florida's citrus advertising campaign. Rather, they are simply being required to indicate that the product being sold came from Florida, so that those consumers desiring Florida-produced citrus will be able to purchase such. Stamping a container "Florida" is not an expression of an opinion. It is an expression of fact, similar to listings of ingredigents and the like. The strictures of *Barnette*, condemning forced adherence to opinions are inapplicable here." *Coca Cola Co.*, Supra at 1087, (Appellant's Appendix A at Pg 16a)

The perceptions of the Florida Supreme Court incapsulate the policy and constitutional perspectives of the parties to this Appeal. The Department, by the promulgation of its identification Rule, seeks to obtain two objectives: (a) consumer protection and (b) product promotion. Requiring the identification of "Florida" to be placed on a specifically limited, but qualified product line, insures that minimum standards of grapefruit product quality in accordance with Florida Statutory standards can be recognized by the consumer. When the "Florida" identification stamp is placed on a qualified product, the stamp signifies the juice is 100% Florida grapefruit product from grapefruit grown in Florida and processed in Florida under the only existing statutory standards.

The Department's Rule does not prevent Appellant from processing a higher quality grapefruit product or advertising its product is of a higher quality than the Department's minimum standard. The Appellant's advertisement campaign can take what ever form it wishes. If the Appellant wants to reap the benefits of the Department's advertisement campaign, it need only go beyond the identification mark, "Florida", and use the "Florida Sunshine Tree" identification. A mere glimpse at

Appellant's Appendix H which exhibits examples of the Department's advertisement campaign, shows that the Department's objective of product promotion is linked to the "Florida Sunshine Tree".

The Department and the State's interest in informing and protecting the consumer while simultaneously promoting the Florida Citrus industry is consistent with Appellant's First Amendment rights. In fact, Appellant admitted before the Supreme Court of Florida that it was willing to place the Florida "Label" if it would increase sales. Thus, Appellant's First Amendment rights do have a price. *Coca Cola Co.*, supra at pg 1086 (Appellant's Appendix A, pg 15a).

Admittedly, a more restrictive rule might invade the constitutional membrane of Appellant's "commercial speech"; that is not the case here. The State has a right to regulate the processing of grapefruit product and to have the consumer informed that the quality standards have been met. The State also has a right to promote its citrus industry. Unless, it can be shown that Appellant is forced to go beyond the consumer protection standard by the Rule then its First Amendment rights to commercial speech have not been violated.

CONCLUSION

The questions presented by the Appellant in this appeal do not raise any substantial issues under the Constitution of the

United States. Probable jurisdiction is not noted and the Appeal should be dismissed.

Respectfully submitted,

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May 7, 1982

Appendix

DEPARTMENT OF CITRUS

RULES
OF THE
DEPARTMENT OF CITRUS

CHAPTER 20-94
OWNERSHIP AND USE OF "FLORIDA SUNSHINE TREE" CERTIFICATION MARK

20-94.01	Ownership.
20-94.02	Permission Required for Use.
20-94.03	General Restrictions on the Use of "Florida Sunshine Tree" Symbol.
20-94.04	Use on Fruit and Containers
20-95.05	Withdrawal of License or Permission.
20-94.06	Definitions.

20-94.01 Ownership. The "Florida Sunshine Tree" symbol, as shown below,

is a registered certification mark of the State of Florida, Department of Citrus, protected by U.S. Patent Office registration No. 941,773 and certain foreign registrations. All right, title and interest in and to said symbol, granted to and vested in the State of Florida, Department

of Citrus, via State and Federal laws, is hereby noticed to all interested persons.
General Authority 601.10(1), 601.11, 601.15(2)(j), (10)(a) FS. Law Implementd 601.101 FS. History — Formerly 105-1.46(1) Revised 1-1-75.

20-94.02 Permission Required for Use. Use of said mark by any person, firm or corporation, in any manner will not be permitted without a license or other express written permission from the Department of Citrus and unless such use is in conformity with the requirements of this rule. However, such permission shall not be denied to any person, firm or corporation who complies with the requirements of this rule, it being the express purpose of the Department of Citrus to encourage widespread use and, at the same time, to protect the integrity of the symbol.
General Authority 601.10(1), 601.11, 601.15(2)(j), (10)(a) FS. Law Implemented 601.101 FS. History — Formerly 105-1.46(2), Revised 1-1-75.

20.94.03 General Restrictions on the Use of "Florida Sunshine Tree" Symbol.

(1) Use of the "Florida Sunshine Tree" symbol shall be restricted to use in conjunction with the advertising, promotion, merchandising, and packaging of citrus fruit which is grown in the State of Florida, and citrus products processed or manufactured from or with citrus fruit grown in the State of Floirda, and which meet the grade and quality standards for citrus fruits and citrus products set forth by the laws of the State of Florida and rules of the Department of Citrus, and which meet the applicable federal standards of identify, if any, promulgated by the Secretary of Health, Education and Welfare of the United States under the Federal Food, Drug and Cosmetic Act.

(2) Each licensee or other authorized user of said symbol shall be required, as a condition for such authorization, to allow reasonable and periodic inspections by a Department of Citrus representative or agent, of the pertinent records and the processing or manufacturing premises of said users at all stages in the channel of trade of such citrus products in order to determine whether or not said citrus

products meet the requirements set forth herein and otherwise to protect the integrity of said symbol.

(3) The "Florida Sunshine Tree" symbol shall not be used in any advertising, promotion, merchandising or packaging in lieu of a brand name or used in conjunction with a brand name in such a manner as to dominate or appear to be a part of a brand name.

(4) The "Florida Sunshine Tree" symbol, as shown in Section 20-94.01, must be used in its entirety, including the surrounding phrase "A product of the Florida Sunshine Tree."

(5) Each licensee or other authorized user of the symbol shall deliver to the Department of Citrus for its records, a finished sample of any material bearing the symbol.
General Authority 601.10(1), 601.11, 601.15(2)(j), (10)(a) FS. Law Implemented 601.101 FS. History — Formerly 105-1.46(3), Revised 1-1-75.

20-94.04 Use on Fruit and Containers.

(1) The "Florida Sunshine Tree" symbol may, at the option of the shipper, be applied directly to the skin of any fresh citrus fruit grown in the State of Florida, or may be used on any approved fresh citrus fruit shipping container or retail package, containing citrus fruit grown in the State of Florida, provided the symbol does not dominate or appear to be a part of any brand name.

(2) The "Florida Sunshine Tree" symbol, when used on consumer sized containers of processed citrus products made from or with citrus fruit grown in the State of Florida, shall be limited to one such symbol per brand facing per container label and/or one such symbol at either the top or bottom end of the same container. Said symbol may also be used on the outside packaging of multi-pack units and on outside shipping cartons containing such processed citrus products, provided said symbol does not dominate or appear to be a part of any brand name.
General Authority 601.10(1), 601.11, 601.15(2)(j), (10)(a) FS. Law Implemented 601.101 FS. History — Formerly 105-1.46(4), Revised 1-1-75.

20-94.05 Withdrawal of License of Permission. The Department of Citrus reserves the right to withdraw any given license or permission to use the "Florida Sunshine Tree" symbol upon the failure of the authorized user to comply with the provisions set forth herein.
General Authority 601.10(1), 601.11, 601.15(2)(j), (10)(a) FS. Law Implemented 601.101 FS. History — Formerly 105-1.46(5), Revised 1-1-75.

20-94.06 Definitions.

(1) "Citrus fruit" as used herein, shall mean all citrus fruits in fresh form.

(2) "Citrus products" as used herein, shall mean all juices, segments and sections processed or manufactured from "citrus fruit," except as hereinafter provided, and non-standardized citrus by-products as specifically designated by the Department. The term "juice" shall mean single-strength or concentrated juices, and shall include reconstituted concentrated juices, but shall not mean diluted juices, concentrate for diluted juice products, blended juices containing other than the juice of "citrus fruit," or fruit salads containing more than 2% of fruit indgredients other than "citrus fruit."
General Authority 601.10(1), 601.11, 601.15(2)(j), (10)(a) FS. Law Implemented 601.101 FS. History — Formerly 105-1.46(6), Revised 1-1-75.

APPENDIX B

FLORIDA STATUTES, SECTION 601.9906
DEPARTMENT OF CITRUS RULE 20-64

Fla. Stat. § 601.9906 Canned grapefruit juice; standards; labeling

No canned grapefruit juice shall be sold or offered for sale or shipped or offered for shipment which:

(1) Is prepared from raw juice containing before the addition of any additive, less than 7.5 percent total soluble solids;

(2) When canned, contains less than nine percent total soluble solids;

(3) Has a ratio of total soluble solids to anhydrous citric acid of less than 7.5 to 1; provided, this subsection shall not apply to canned grapefruit juice produced prior to July 1, 1963;

(4) Contains less than 0.75 percent anhydrous citric acid;

(5) Contains more than 0.020 percent recoverable oil; or

(6) Does not meet requirements to be established by the department of citrus regarding color, absence of defects, taste, and flavor; unless the immediate container thereof shall be labeled in accordance with regulations of the department of citrus and there shall appear on such label the word "substandard" in bold type not less than one-fourth inch high printed or stamped diagonally thereon.

Amended by Laws 1971, c. 71-186, § 22.

STANDARDS FOR PROCESSED CITRUS

RULES
OF THE
DEPARTMENT OF CITRUS

CHAPTER 20-64
STANDARDS FOR PROCESSED CITRUS PRODUCTS

20-64.01	Grades Established.
20-64.02	Canned Orange Juice.
20-64.03	Grapefruit Juice — Canned and Chilled
20-64.04	Canned Blend of Orange and Grapefruit Juice.
20-64.05	Other Mixtures of Orange and Grapefruit Juice.
20-64.06	Canned Tangerine Juice.
20-64.07	Frozen Concentrated Orange Juice.
20-64.08	Concentrated Orange Juice for Manufacturing.
20-64.09	Frozen Concentrated Grapefruit Juice
20-64.10	Frozen Concentrated Grapefruit Juice for Manufacturing.
20-64.11	Frozen Concentrated Blended Grapefruit Juice and Orange Juice.
20-64.12	Other Concentrated Citrus Fruit Juices.
20-64.13	Canned and Frozen Grapefruit Sections.
20-64.14	Canned Grapefruit and Orange for Salad.
20-64.15	Chilled Orange Juice.
20-64.16	Concentrate for Soft Serve Orange Juice.
20-64.17	Gelled Sunshine Citrus Salad.
20-64.18	Other Chilled Processed Citrus Products.
20-64.19	Products Having No Established State or USDA Grade Standards.
20-64.20	Sanitary Requirements.
20-64.21	Water Extracted Soluble Fruit Solids.

20-64.01 Grades Established. Forida State Grades for processed citrus products shall be as herein provided. Any product failing to meet the grade of minimum quality standards prescribed herein shall be labeled substandard, or in the case of bulk containers, the shipment shall be accompanied by an inspection certificate with the bill of lading and invoice for each shipment clearly bearing the legend "substandard."
Specific Authority 601.10(7), 601.11 FS. Law Implemented 601.10(7), 601.11, 601.48 FS. History — Formerly 105-1.19(1), Revised 1-1-75.

20-64.02 Canned Orange Juice. Florida State Grades shall be identical with current USDA adopted U.S. Grades, with the following exceptions:

(1) Minimum acid requirement for "C" Grade, Syle II (Sweetened) shall be the same as for "C" Grade, Style I (Unsweetened).

(2)(a) During the period August 1 through November 30 each year, the minimum Brix-acid ratio shall be:

11.0 to 1 regardless of Brix for Unsweetened Grade A.
10.0 to 1 for Unsweetened Grade C.
15.0 to 1 regardless of Brix for Sweetened Grades A and C.

(b) During the period December 1 through the following July 31, the minimum Brix-acid ratio for unsweetened Grade A shall be 10.0 to 1.

(3) Product shall meet the requirements of Section 601.9905, Florida Statutes.

(4) All facilities in which the product is stored shall, except for periods not to exceed seven days in the aggregate, be maintained at temperatures not to exceed 50 28 F.; provided, the product need not be refrigerated during processing nor during shipment. The provisions of this subsection shall not apply to product packed in metal containers.

(5) Temperature of the product as it emerges from the can coolers and prior to casing, shall not exceed 100 28 F. However, a

tolerance of one in six or two in thirteen samples is permitted. A lot of product failing to meet the temperature requirement may be cooled for 24 hours and re-inspected for compliance, if during the initial inspection no more than three in six or six in thirteen samples exceed 100 28 F. and no sample exceed 110 28 F.
Specific Authority 601.10(7), 601.11 FS. Law Implemented 601.19(7), 601.11, 601.48, 601.9905, 601.9914(1), (2), (3) FS. History — Formerly 105-1.19(1), (a), Revised 1-1-75.

20-64.03 Grapefruit Juice — Canned and Chilled. Florida State Grades shall be identical with current United States Department of Agriculture adopted U.S. Grades with the following exceptions:

(1) Product shall meet the minimum requirements of Section 601.9906, Florida Statutes.

(2) No single strength grapefruit juice shall contain soluble solids recovered by aqueous extraction or washing of fruit pulp.

(3) The reconstituted type product shall be not less than 10% soluble grapefruit solids exclusive of the solids of any added sweetener.

(4) Pink and red seedless grapefruit used in the production of this product, graded within the two highest grades, shall meet the same minimum total soluble solids as required for white seedless grapefruit.

(5) For the period August 1 to December 1 of each season:

(a) Grade A finished product packed in retail sized containers of 64 oz. or less shall meet at least one of the following requirements:

1. Contains less than 5.0 ppm limonin, measured by high pressure liquid chromatography, or

2. Contains less than 600 ppm naringin, measured by the Davis Test.

(b) Grade B finished product packed in retail sized containers of 64 oz. or less shall meet at least one of the following requirements:

1. Contains less than 7.0 ppm limonin, measured by high pressure liquid chromatography, or

2. Contains less than 750 ppm naringin, measured by the Davis Test.

(c) Maximum naringin and limonin requirements set forth in subsection (5)(a) and (5)(b) shall not apply:

1. To reconstituted finished product produced solely from concentrate processed between December 2 and July 31, or

2. To finished product produced from concentrate of bulk single strength juice processed between December 2 and July 31, provided any juice or concentrate processed during the period August 1 to December 1 which is blended therewith meets the permissible limits of naringin or limonin for Grade A or Grade B product respectively.

Specific Authority 601.10(7), 601.11 FS. Law Implemented 601.10(7), 601.11, 601.48, 601.9906, 601.9914(1), (2), (3) FS. History — Formerly 105-1.19(1)(b)(6), Revised, 1-1-75, Amended 9-15-75, 10-19-76, 3-16-80.

Appellant's Reply Brief

No. 81-1829

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KRAFT, INC.,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF CITRUS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

REPLY BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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Case: PAGE

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 1

Statutes:

Cal. Admin. Code tit. 17, R. 17,000 *et seq.* 4n

N.Y. Agric. & Mkts. Law §§ 156h *et seq.* (McKinney 1972) 4n

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Constitution:

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STATE OF FLORIDA, DEPARTMENT OF CITRUS,

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

REPLY BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

In our Jurisdictional Statement, we urged that Rule 20-66.04 could not stand against First Amendment challenge because the intended and actual effect of the Rule was to force Kraft to associate itself unwillingly with state advertising claims with which it chose not to be associated and with which, in fact, it substantively disagreed. Florida's response acknowledges that one purpose of the statute was what it characterizes as "product promotion." (Motion to Dismiss at p. 8) As set forth in our Jurisdictional Statement, a state's interest in the promotion of its products is utterly insufficient to overcome Kraft's First Amendment rights. (Jurisdictional Statement, pp. 12-24) Cf. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

Now, in its Motion to Dismiss, Florida for the first time in this case asserts, as underlying its adoption of Rule 20-66.04, the additional and distinct purpose of "consumer protection." (Motion to Dismiss at p. 8; *see also id.* at pp. 3, 6-7, 9) There is, quite simply, no support at any point in the record of this case for such a submission. Florida has never urged it before. It cites nothing in the record in support of it now. The opinion and order of the Citrus Commission (Appendix B, 21a) could hardly be clearer or more explicit that the purpose of the Rule is to "enable the Department to relate its consumer commodity advertising programs to a specific product readily identifiable by the consumer in the marketplace," and to "increase the effectiveness of the Department's commodity advertising and promotional programs" (23a); there is not the slightest suggestion that the Citrus Commission viewed "consumer protection" as even a marginal legislative purpose in enacting the Rule. (*See id.* at p. 23a)

There is, as well, not the slightest reference in either the opinion of the Florida District Court of Appeal (Appendix C, 26a) or of the Florida Supreme Court (Appendix A, 1a) to this supposed legislative purpose. In fact, the opinions of these courts are explicit in recognizing that the purpose of the Rule is the "solely economic" one of increasing the effectiveness of the State's advertising. Thus, the Court of Appeal stated that:

> "Respondent has determined that in the face of increasing competition from other grapefruit-producing areas in the marketplace, identification of Florida products is necessary for Respondent's advertising to be effective. We cannot quarrel with that conclusion [although] [i]t is true that Respondent has not cited, nor have we found, a single case from any jurisdiction ad-

> dressing the question whether a mandatory declaration of state origin on a state product for solely economic purposes is a valid exercise of the state's police power." (49a-50a)

The Florida Supreme Court recognized that the Rule before it could *not* be sustained, as had previous regulations challenged under the police power, as a rule intended to prevent fraud or deception against the public. In order to sustain the Rule, it was obliged to overrule a holding that economic considerations alone were an inadequate basis for police power legislation, a path obviously unnecessary had an alternative explanation of legislative purpose been available. It said:

> "The labeling requirement in the case *sub judice* . . . bears a rational relationship to a legitimate objective; in this case, increased sales of Florida citrus. Whether it is the best means of achieving that goal is not important to our analysis.
>
> "Appellants argue that all police power regulations of the citrus industry which have heretofore been upheld by this Court have been based upon a showing that the rule was necessary to prevent fraud and deception. They also cite a case in which the Fourth District Court of Appeal held that economic considerations are an improper basis for exercise of the police power. . . . We disagree with [that] opinion . . . to the extent that it holds economic considerations an improper basis for exercising the police power." (11a-12a)

This Court is thus confronted with a case in which Florida has clearly and unambiguously set forth its sole legislative purpose. It is not, nor has it ever been, "con-

sumer protection" or anything like it.* It is instead, in the words of the Citrus Commission, that of increasing "the effectiveness of the Department's commodity advertising and promotional programs . . ." (23a) That is hardly an improper state interest for Florida to consider; it is simply an insufficient one to overcome the First Amendment interests at stake on this appeal.

---

* We do not suggest that consumer protection, when it is the state's authentic purpose in enacting a labeling statute, would be an improper one. Several states have enacted constitutionally unexceptionable regulations requiring state products to meet certain grade and quality qualifications if producers wish to use the state name on their products. However, none of these statutes makes state identification mandatory. Cal. Admin. Code tit. 17, R. 17,000 *et seq.*; N.Y. Agric. & Mkts. Law §§ 156h *et seq.* (McKinney 1972); R.I. Gen. Laws § 21-25-1 (1963); Tex. Agric. Code Ann. §§ 93.001 *et seq.* (Vernon 1982); Vt. Stat. Ann. tit. 6, § 516 (1972); Va. Code § 3.1-868 (1973).

CONCLUSION

The questions presented by this appeal are substantial. Probable jurisdiction should be noted and the case set down for argument.

Respectfully submitted,

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May 14, 1982